

No. 16504

United States
Court of Appeals
for the Ninth Circuit

FRANK A. DUDLEY, as Trustee of the Estate
of Merle K. Branch and Wanda B. Branch,
Co-partners d/b/a Riddle General Store, Bank-
rupts,

Appellant,

vs.

CLIFFORD E. DICKIE and MARION E. DICKIE,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon.

FILED
OCT 12 1959
PAUL P. O'BRIEN, CLERK

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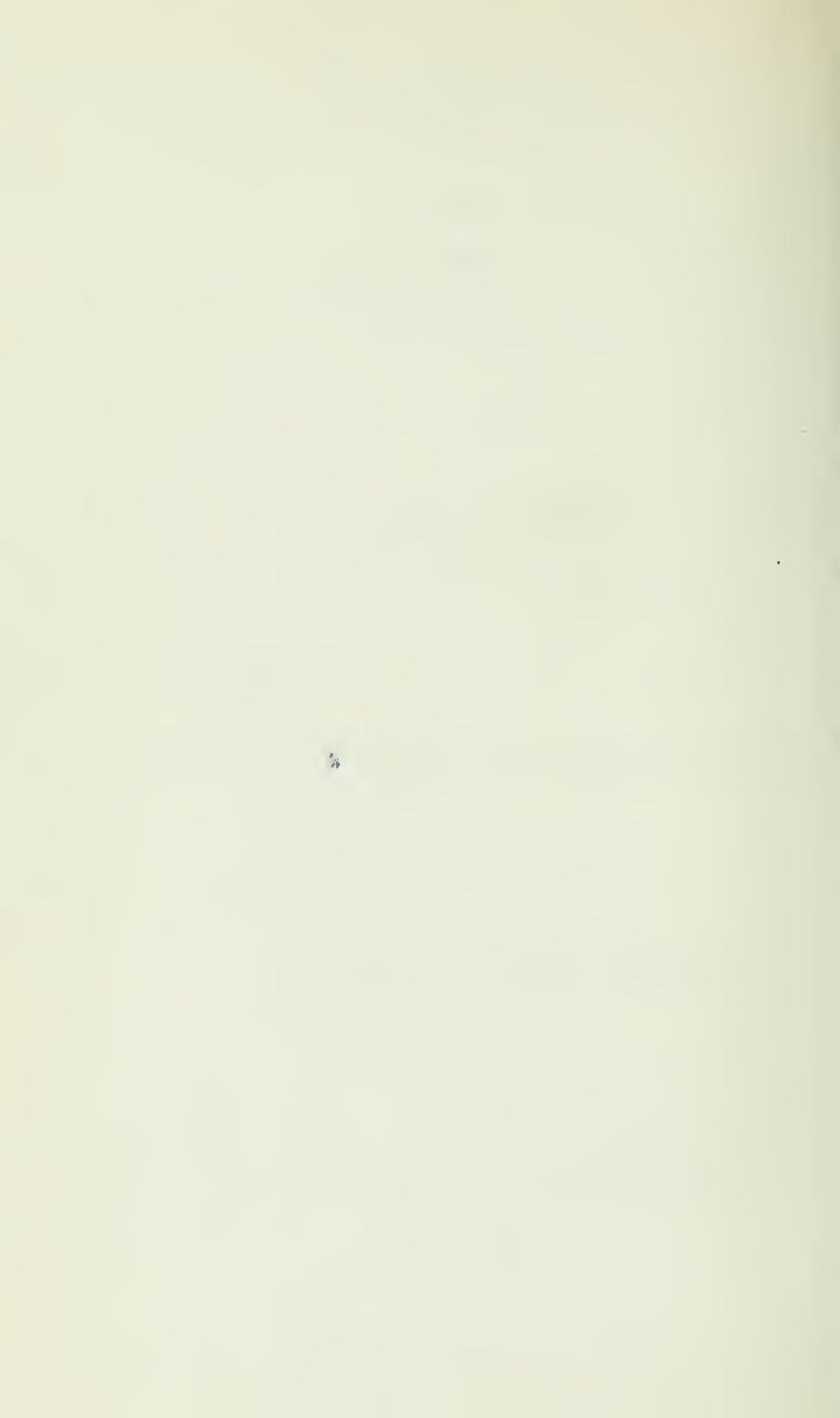
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Oregon

In Bankruptcy

Civil No. 9425

FRANK A. DUDLEY as Trustee of the Estate of
Merle K. Branch and Wanda B. Branch, Co-
partners dba Riddle General Store, Bankrupts,
Plaintiff,

vs.

CLIFFORD E. DICKIE and MARION E.
DICKIE, Husband and Wife,
Defendants.

PRETRIAL ORDER

This cause came on for pretrial conference before the undersigned Judge of the above-entitled Court, plaintiff appearing by F. Brock Miller, one of the plaintiff's attorneys, and defendants appearing by Moe M. Tonkon and Leo Levenson, their attorneys.

Subject to the approval of said defendants, said parties agreed upon the following:

Jurisdiction

That suit arises under Section 60(B) of the Bankruptcy Act, and the United States District Court of the District of Oregon, sitting as a Court of Bankruptcy (as provided by Section 2(a) of said Act) has jurisdiction of this cause.

Agreed Facts

I.

Plaintiff is the duly elected, qualified and acting Trustee of the Estate of Merle K. Branch and Wanda B. Branch, copartners dba Riddle General Store, which said estate is being administered by this Court and being designated Case No. B-40999.

II.

That each of said defendants is a resident of the State of Oregon, within the judicial district of this Court.

III.

That on July 1, 1957, and for approximately two years, immediately prior thereto, Wanda B. Branch and Merle K. Branch were copartners doing business under the assumed name and style of Riddle General Store, and said copartners operated a general store at Riddle, Oregon.

IV.

That on July 10, 1957, said Wanda B. Branch and Merle K. Branch, copartners dba Riddle General Store, filed in the United States District Court for the District of Oregon, in Bankruptcy, a petition praying for adjudication as a bankrupt, under and pursuant to said Bankruptcy Act; and, thereafter, and on July 11, 1957, said bankrupt copartnership was duly adjudged a bankrupt; that thereafter plaintiff was elected Trustee of the Estate of said Bankrupts, and duly qualified by filing bond.

V.

That on or about April 11, 1955, defendants sold to said bankrupts a certain general store, then known as Riddle General Store at Riddle, Oregon, including fixtures and equipment, and a stock of merchandise, under and pursuant to a conditional sales contract, which is Exhibit "A" filed herein, and by reference made a part hereof.

VI.

That said conditional sales contract was not acknowledged so as to entitle same to be recorded in the chattel mortgage records, but nevertheless said contract was recorded on June 21, 1957, in Volume 23 at page 678 of the Chattel Mortgage Records of Douglas County, Oregon; that said recording was without legal effect in this cause.

VII.

That said bankrupts operated the Riddle General Store from April 11, 1955, until on or about July 1, 1957.

VIII.

That on or about June 21, 1957, said defendants commenced in the Circuit Court of the State of Oregon for the County of Douglas, a suit against the said bankrupts, a copy of the complaint being marked Exhibit C, in which suit the defendants, as plaintiffs, prayed for a decree of said court, decreeing them to be the absolute owners of all of the furniture, fixtures and stock of merchandise located at the Riddle General Store, free and clear

of any claims, right, title and interest of said bankrupts, and praying for the immediate possession of said furniture, fixtures and stock of merchandise in accordance with the copy of said complaint, marked Exhibit "C" and filed herein.

IX.

That on or about July 1, 1957, the said bankrupts stipulated in writing in said suit, in said Circuit Court, in accordance with Exhibit "D" on file herein, and thereafter, and on said July 1, 1957, a judgment was entered in said Circuit Court suit, foreclosing in favor of said defendants herein the interest of said bankrupts in and to said Riddle General Store in accordance with the decree marked Exhibit "E" and filed herein.

X.

That on or about said July 1, 1957, said defendants took possession of said Riddle General Store, including the inventory of merchandise then on hand, which said inventory was in the amount of \$14,786.17.

XI.

That plaintiff did, on October 4, 1957, demand that said defendants return the said merchandise to said plaintiff, or pay for same, and defendants have failed and refused so to do.

XII.

That Merle K. Branch and Wanda B. Branch, individually and as copartners, dba Riddle General

Store, between June 21, 1957, and July 1, 1957, inclusive, were insolvent in that the fair market value of their assets was less than the amount of their liabilities.

XIII.

That plaintiff has on hand the sum of \$1,374.44; that no further assets remain to be liquidated.

XIV.

That provable claims have been filed in the bankruptcy proceeding as follows:

- A. Priority claims\$3,273.32
- B. General claims\$11,534.48

XV.

Plaintiff makes no claim to the fixtures or equipment sold under said conditional sales contract and subsequently recovered by defendants, and this proceeding is limited solely to the stock of merchandise, possession of which was secured by said defendants on or about July 1, 1957.

Contentions of Plaintiff

I.

That on or about July 1, 1957, said defendants, and each of them, had reasonable cause to believe that said bankrupts, and each of them, were insolvent.

II.

That during the period of the operation of said store by said bankrupts, said bankrupts sold said

merchandise purchased upon said conditional sales contract and replenished same by purchase of other and different merchandise; that the merchandise on hand on July 1, 1957, was not the identical merchandise owned by the defendants and sold to the bankrupts, but rather was merchandise purchased by said bankrupts in replenishment thereof.

III.

That said merchandise was transferred to said defendants, and each of them, as creditors of said bankrupts, for and on account of an antecedent debt, namely, the indebtedness due by said bankrupts to said defendants upon said conditional sales contract dated April 11, 1955.

IV.

That said defendants are not bona fide purchasers for value of the said assets, and the said defendants did not give to said bankrupts a present fair value or any lesser value as consideration of said transfers.

V.

That said transfer to said defendants resulted in a depletion of the assets of the said bankrupts thereby enabling said defendants to obtain a greater percentage of their indebtedness than some other creditors in the same class.

VI.

That said transfers to said defendants constituted a preferential transfer contrary to and voidable

under the provisions of the Bankruptcy Act and, in particular, Section 60 thereof.

VII.

That plaintiff is entitled to judgment against the defendants, and each of them, in the sum of \$14,-786.17, with interest at six per cent per annum from October 4, 1957, until paid, and for plaintiff's costs and disbursements incurred herein.

Contentions of Defendants

I.

The judgment and decree of the Circuit Court for Douglas County, Oregon, on July 1, 1957, in favor of defendants and the taking possession of all the property in the Riddle General Store on July 1, 1957, and prior to the filing of the bankruptcy proceedings, did not create a preference.

II.

The plaintiff, as Trustee, is not a bona fide purchaser for value without notice of defendants' title.

III.

The judgment and decree of the Circuit Court for Douglas County, Oregon, on July 1, 1957, restoring to defendants all their right, title and interest in and to the property of the Riddle General Store is *res judicata*.

IV.

That when defendants took possession of the Riddle General Store on July 1, 1957, they asserted

their legal right to possession of their own property under and by virtue of the conditional sales contract made and executed between the defendants, as sellers, and the bankrupts as buyers on April 11, 1955.

V.

The conditional sales contract was valid between the parties and possession of all the personal property described therein, taken by the defendants prior to the bankruptcy and pursuant to the decree of the Circuit Court of the State of Oregon for the County of Douglas restored them to their rightful ownership of all of said personal property.

VI.

That on July 1, 1957, defendants were entitled to possession of all of the personal property located in the Riddle General Store, in accordance with the provisions of the conditional sales contract executed on April 11, 1955, between defendants, as sellers, and bankrupts, as buyers, and the Oregon Law relating thereto.

VII.

That defendants are entitled to a judgment of dismissal of plaintiff's complaint, and to their costs and disbursements incurred herein.

Issues of Fact

I.

Did defendants, or their agents acting with reference to this transaction, on the date of said trans-

fer, have reasonable cause to believe that said bankrupts were insolvent?

II.

Was the merchandise received by the defendants from said bankrupts the identical merchandise sold by them to said bankrupts, or was it other and different merchandise purchased by said bankrupts from other suppliers, in replenishment of that originally sold by the defendants?

III.

Was the indebtedness due from said bankrupts to said defendants, for which said transfer was made, an antecedent indebtedness?

IV.

Did said transfer to said defendants result in a depletion of the assets of the estate of said bankrupts, thereby enabling said defendants to obtain a greater percentage of their indebtedness than other creditors in the same class?

Issues of Law

I.

Did defendants on July 1, 1957, and immediately prior to the transfer of the stock of merchandise to them, have legal title to all of said merchandise or were said defendants chattel mortgagees of said merchandise?

II.

If said defendants were chattel mortgagees of said stock and personal property, did said defend-

ants perfect the transfer of said stock of merchandise within the meaning of Sections 60a(2) and 60a(6) of the Bankruptcy Act by:

A. Taking possession of said stock of merchandise on July 1, 1957?

B. Securing the stipulation of defendants in said Circuit Court proceeding on July 1, 1957, to take possession of same?

C. Securing the decree of said Circuit Court declaring that said defendants were entitled to possession of said stock of merchandise?

III.

Was the legal effect of said decree of said Circuit Court to declare that defendants had theretofore held legal title to said stock of merchandise, or, in the alternative, to effect a foreclosure upon said merchandise of a pre-existing lien thereon?

IV.

Was the indebtedness due from said bankrupts to said defendants for which said transfer was made an antecedent indebtedness?

V.

Did said transfer to said defendants result in a depletion of the assets of said bankrupts, thereby enabling said defendants to obtain a greater percentage of their indebtedness than other creditors in the same class?

VI.

Was said transfer of said stock of merchandise to said defendants a preferential transfer voidable under Section 60 of the Bankruptcy Act?

VII.

Is plaintiff entitled to Judgment for the return of said stock of merchandise in the event that defendants are unable to return said merchandise for the sum of \$14,786.17, with interest at 6% per annum from October 4, 1957, until paid?

VIII.

Was the retaking of the stock of merchandise by the sellers, including after-acquired stock in place of that disposed of, and pursuant to a decree of foreclosure, within four months prior to the filing of buyer's petition in bankruptcy, a preference under the Bankruptcy Act?

IX.

Was the judgment and decree of the Circuit Court an enforcement of a valid pre-existing contractual rights and not a lien obtained by a judgment within the definition of Section 67 of the Bankruptcy Act?

X.

Is the decree and judgment of the Circuit Court res judicata as to the validity of the conditional sales agreement and the rights of the defendants thereunder as against the Trustee in Bankruptcy?

XI.

Are defendants entitled to a dismissal of the suit commenced and for a judgment for costs incurred?

The foregoing is a Pretrial Order agreed upon at a conference between counsel and the Court. It shall not be amended at the trial except by consent or to prevent manifest injustice. It is ordered that this Pretrial Order supersedes the pleadings which now pass out of the picture.

No demand for jury trial was made by either party.

The foregoing Pretrial Order is hereby approved and entered this 10th day of November, 1958.

/s/ GUS J. SOLOMON,
Judge.

The foregoing form of Pretrial Order is hereby approved:

/s/ F. BROCK MILLER,
Of Attorneys for Plaintiff.

/s/ MOE M. TONKON,
Of Attorneys for Defendant.

Lodged August 14, 1958.

[Endorsed]: Filed November 10, 1958.

[Title of District Court and Cause.]

OPINION

December 29, 1958

Solomon, Judge:

The trustee in bankruptcy brings this action under § 60(b) of the Bankruptcy Act to set aside an alleged preferential transfer to Clifford E. and Marion E. Dickie of a stock of merchandise. On April 11, 1955, the bankrupts purchased from the Dickies, who were operating a general store, the stock of merchandise under a conditional sales contract. The bankrupts went into possession of said store and operated it. When they stopped making payments as required by the agreement, the Dickies filed an action against the bankrupts in the Circuit Court of the State of Oregon for the County of Douglas to declare the Dickies to be the owners and entitled to possession of all the furniture, fixtures, and stock of merchandise located at the general store. On July 1, 1957, pursuant to stipulation of the parties, the Circuit Court decreed the Dickies to be the sole owners and entitled to the immediate possession of the furniture, fixtures and stock of merchandise located at the general store, free and clear of all liens, claims, rights, title and interest of the purchasers (bankrupts) and all persons claiming by, through or under them, and on the same day the Dickies took possession of the general store and its stock of merchandise. Within four months the purchasers were adjudicated bank-

rupts, and the trustee then brought this action to set aside the transfer by which the Dickies obtained possession of the stock of merchandise.

Practically all of the facts of this dispute were stipulated except for the portion of the original stock of merchandise which remained unsold during the period of the bankrupts' operation of the store and returned to defendants' possession on July 1, 1957, which amount I find to be approximately fifty per cent of the original stock.

I shall not further discuss the facts nor shall I discuss all of the numerous contentions and issues set out in the pretrial order because in my view the effect of the decree of the Circuit Court of the State of Oregon for Douglas County is dispositive of the issues involved in this case.

The ninth and tenth issues of law in the pretrial order are:

IX. Was the judgment and decree of the Circuit Court an enforcement of a valid pre-existing contractual right and not a lien obtained by a judgment within the definition of § 67 of the Bankruptcy Act?

X. Is the decree and judgment of the Circuit Court *res judicata* as to the validity of the conditional sales agreement and the rights of the defendants thereunder as against the Trustee in Bankruptcy?

I find the answer to both is in the affirmative.

In *Clark v. Mutual Lumber Co.*, 5 Cir. 1953, 206 F. 2d 643, the trustee in bankruptcy brought an action to set aside as a voidable preference a mortgage and subsequent foreclosure rendered in favor of defendant by the Circuit Court of Duval County, Florida. The bankrupt corporation had mortgaged its real property to defendant, a creditor of the bankrupt, in the amount of the debt owed by the bankrupt to defendant, and on January 4, 1951, defendant sued to foreclose. The corporation was adjudicated a bankrupt on February 1, 1951, and on February 21, 1951, the Circuit Court of Duval County entered its final decree of foreclosure; the trustee never intervened in the state court proceeding. The Court of Appeals ruled that the state court decree was *res judicata* on the issue of title or interest to the property, and its determination that the bankrupts had no title bound both the bankrupt and its trustee. The court stated at page 647:

“It is clear that, upon his election as trustee in bankruptcy, appellant herein became vested with title only to such property as belonged to the bankrupt at the time of the commencement of the bankruptcy proceedings, and has no right to have set aside the transfer of property, such as that here involved, which did not according to the decree of the state court belong to the bankrupt.”

See also *Stark v. Baltimore Soda Fountain Mfg. Co.* (D.C. Md. 1952), 101 F. Supp. 842; *Covey v.*

American Distilling Co., 7 cir. 1943, 132 F. 2d 453, and *In re Mercury Engineering, Inc.* (D.C. Cal. 1946), 68 F. Supp. 376.

Defendants shall prepare findings of fact, conclusions of law and a judgment for defendants all in accordance with this opinion.

[Endorsed]: Filed December 29, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled cause having come on regularly for trial before the above Court sitting without a jury on November 10, 1958, the plaintiff appearing by F. Brock Miller, one of his attorneys, and defendants appearing by Leo Levenson and Moe M. Tonkon, and the Court having heard and considered evidence, both oral and documentary; the admitted facts in the pretrial order; contentions of the parties in the pretrial order; oral argument and briefs of the respective parties, and now being fully advised, makes the following Findings of Fact:

I.

This suit arises under Section 60 (B) of the Bankruptcy Act and the United States District Court for the District of Oregon sitting as a Court of Bankruptcy (as provided for by Section 2 (a)) has jurisdiction of this cause.

II.

Plaintiff is the duly elected, qualified and acting Trustee of the Estate of Merle K. Branch and Wanda B. Branch, copartners, dba Riddle General Store, which said estate is being administered by this Court and being designated Case No. B-40999.

III.

That each of said defendants is a resident of the State of Oregon, within the judicial district of this Court.

IV.

That on July 1, 1957, and for approximately two years, immediately prior thereto, Wanda B. Branch and Merle K. Branch were copartners doing business under the assumed name and style of Riddle General Store, and said copartners operated a general store at Riddle, Oregon.

V.

That on July 10, 1957, said Wanda B. Branch and Merle K. Branch, copartners, dba Riddle General Store, filed in the United States District Court for the District of Oregon, in Bankruptcy, a petition praying for adjudication as a bankrupt, under and pursuant to said Bankruptcy Act; and, thereafter, and on July 11, 1957, said bankrupt copartnership was duly adjudged a bankrupt; that thereafter plaintiff was elected Trustee of the Estate of said Bankrupts, and duly qualified by filing bond.

VI.

That on or about April 11, 1955, defendants sold to said bankrupt a certain general store known as Riddle General Store at Riddle, Oregon, including fixtures, furniture and equipment and a stock of merchandise under and pursuant to a Conditional Sales Contract.

VII.

That said bankrupt operated the Riddle General Store from April 11, 1955, until on or about July 1, 1957.

VIII.

That said bankrupt ceased making payments as required by the terms of the Conditional Sales Contract and on or about June 21, 1957, defendants commenced in the Circuit Court of the State of Oregon for Douglas County, a suit against said bankrupt wherein defendants prayed for a decree adjudging them to be the absolute owners of all of the furniture, fixtures and stock of merchandise located at the Riddle General Store, free and clear of any claim, right, title or interest of said bankrupt and praying for immediate possession of said furniture, fixtures and stock of merchandise.

IX.

That on or about July 1, 1957, the said bankrupt and defendants stipulated in writing in said suit that defendants were entitled to a decree as prayed for in their complaint and pursuant thereto, the Circuit Court of the State of Oregon for Douglas County, entered a judgment in favor of the defend-

ants that they were the sole owners of the furniture, fixtures and stock of merchandise located in the Riddle General Store, free and clear of any claim, right, title or interest of said bankrupt and all persons claiming by, through or under them, and pursuant thereto and on the same day, defendants took possession of the general store and its stock of merchandise.

X.

That at the time defendants took possession there was approximately 50% remaining which was the original stock of merchandise purchased by the bankrupt from defendants.

XI.

The judgment and decree of the Circuit Court for Douglas County, Oregon, on July 1, 1957, in favor of defendants, adjudging said defendants to be the absolute owners of all of the furniture, fixtures and stock of merchandise located at the Riddle General Store, free and clear of any claim, right, title and interest of said bankrupts and prior to the filing of the bankruptcy proceedings, was res judicata and conclusive of the rights of the defendants and the bankrupts and was an enforcement of a valid pre-existing contractual right and not a lien obtained by a judgment within the definition of Section 67 of the Bankruptcy Act; that the aforesaid judgment and possession of said property by defendants did not result in a preference within the provisions of the Bankruptcy Act.

Conclusions of Law

The judgment and decree of the Circuit Court for Douglas County, Oregon, on July 1, 1957, in favor of defendants, adjudging said defendants to be the absolute owners of all of the furniture, fixtures and stock of merchandise located at the Riddle General Store, free and clear of any claim, right, title and interest of said bankrupts and prior to the filing of the bankruptcy proceedings, was res judicata and conclusive of the rights of the defendants and the bankrupts and was an enforcement of a valid pre-existing contractual right and not a lien obtained by a judgment within the definition of Section 67 of the Bankruptcy Act; that the aforesaid judgment and possession of said property by defendants did not result in a preference within the provisions of the Bankruptcy Act.

Defendants Clifford E. Dickie and Marion E. Dickie, husband and wife, are entitled to a judgment dismissing plaintiff's complaint.

Dated at Portland, Oregon, this 5th day of January, 1959.

/s/ GUS J. SOLOMON,
Judge.

Affidavit of service by mail attached.

[Endorsed]: Filed January 5, 1959.

In the United States District Court
for the District of Oregon

In Bankruptcy

Civil No. 9425

FRANK A. DUDLEY as Trustee of the Estate
of Merle K. Branch and Wanda B. Branch,
Copartners, dba Riddle General Store, Bank-
rupts,

Plaintiff,

vs.

CLIFFORD E. DICKIE and MARION E.
DICKIE, Husband and Wife,

Defendants.

JUDGMENT

The above cause having come on regularly for trial before the above Court sitting without a jury on November 10, 1958; plaintiff appearing by F. Brock Miller, one of his attorneys, and defendants appearing in person and by their attorneys, Leo Levenson and Moe Tonkon, and the Court having heard and considered the evidence, both oral and documentary, the admitted facts in the pretrial order; contentions of the parties in the pretrial order; oral arguments and briefs of the respective parties, and the Court having entered Findings of Fact and Conclusions of Law, and good cause appearing,

It is hereby Ordered, Adjudged and Decreed that

plaintiff recover nothing from defendants and that plaintiff's complaint be and the same is hereby dismissed.

Dated this 5th day of January, 1959.

/s/ GUS J. SOLOMON,

United States District Judge.

[Endorsed]: Filed January 5, 1959.

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED FINDINGS OF
FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on regularly for trial before the above Court sitting without a jury on November 10, 1958, the plaintiff appearing by F. Brock Miller, one of his attorneys, and defendants appearing by Leo Levenson and Moe M. Tonkon, and the Court having heard and considered evidence, both oral and documentary; the admitted facts in the pretrial order; contentions of the parties in the pretrial order; oral argument and briefs of the respective parties, and now being fully advised, makes the following Findings of Fact:

I.

This suit arises under Section 60 (B) of the Bankruptcy Act and the United States District

Court for the District of Oregon sitting as a Court of Bankruptcy (as provided for by Section 2 (a)) has jurisdiction of this cause.

II.

Plaintiff is the duly elected, qualified and acting Trustee of the Estate of Merle K. Branch and Wanda B. Branch, copartners, dba Riddle General Store, which said estate is being administered by this Court and being designated Case No. B-40999.

III.

That each of said defendants is a resident of the State of Oregon, within the judicial district of this Court.

IV.

That on July 1, 1957, and for approximately two years, immediately prior thereto, Wanda B. Branch and Merle K. Branch were copartners doing business under the assumed name and style of Riddle General Store, and said copartners operated a general store at Riddle, Oregon.

V.

That on July 10, 1957, said Wanda B. Branch and Merle K. Branch, copartners, dba Riddle General Store, filed in the United States District Court for the District of Oregon, in Bankruptcy, a petition praying for adjudication as a bankrupt, under and pursuant to said Bankruptcy Act; and, thereafter, and on July 11, 1957, said bankrupt copart-

nership was duly adjudged a bankrupt; that thereafter plaintiff was elected Trustee of the Estate of said bankrupts, and duly qualified by filing bond.

VI.

That on or about April 11, 1955, defendants sold to said bankrupt a certain general store known as Riddle General Store at Riddle, Oregon, including fixtures, furniture and equipment and a stock of merchandise under and pursuant to a Conditional Sales Contract.

VII.

That said bankrupt operated the Riddle General Store from April 11, 1955, until on or about July 1, 1957.

VIII.

That said bankrupt ceased making payments as required by the terms of the Conditional Sales Contract, and on or about June 21, 1957, defendants commenced in the Circuit Court of the State of Oregon for Douglas County, a suit against the said bankrupt wherein defendants prayed for a decree adjudging them to be the absolute owners of all of the furniture, fixtures and stock of merchandise located at the Riddle General Store, free and clear of any claim, right, title or interest of said bankrupt and praying for immediate possession of said furniture, fixtures and stock of merchandise.

IX.

That on or about July 1, 1957, the said bankrupt

and defendants stipulated in writing in said suit that defendants were entitled to a decree as prayed for in their complaint and pursuant thereto, the Circuit Court of the State of Oregon for Douglas County, entered a decree in favor of the defendants that they were the sole owners of the furniture, fixtures and stock of merchandise located in the Riddle General Store, free and clear of any claim, right, title or interest of said bankrupt and all persons claiming by, through or under them, and pursuant thereto, and on the same day, defendants took possession of the general store and its stock of merchandise.

X.

That on or about said July 1, 1957, and at the time that defendants took possession of said Riddle General Store, including the inventory of merchandise then on hand, said inventory was in the amount of \$14,786.17; that fifty per cent of said stock of merchandise was the original stock of merchandise purchased by the bankrupt from defendants, and the remaining fifty per cent was merchandise purchased by said bankrupt from other persons and placed in the stock of merchandise in said store.

XI.

That said conditional sales contract was not acknowledged so as to entitle same to be recorded in the Chattel Mortgage Records, but, nevertheless, said contract was recorded on June 21, 1957, in Volume 23 at page 678 of the Chattel Mortgage

Records of Douglas County, Oregon; that said recording was without legal effect in this cause.

XII.

That plaintiff did, on October 4, 1957, demand that said defendants return the said merchandise to said plaintiff, or pay for same, and defendants have failed and refused so to do.

XIII.

That Merle K. Branch and Wanda B. Branch, individually and as copartners, dba Riddle General Store, between June 21, 1957, and July 1, 1957, inclusive, were insolvent in that the fair market value of their assets was less than the amount of their liabilities.

XIV.

That on July 1, 1957, defendants, and each of them, had reasonable cause to believe that said bankrupts were insolvent.

XV.

That the indebtedness due from said bankrupts to said defendants, for which said transfer was made, was an antecedent indebtedness.

XVI.

That plaintiff has on hand the sum of \$1,374.44; that no further assets remain to be liquidated.

XVII.

That provable claims have been filed in the bankruptcy proceedings as follows:

A. Priority claims	\$3,273.32
B. General claims	\$11,534.48

Conclusions of Law

I.

On July 1, 1957, and immediately prior to the transfer of the stock of merchandise to defendants, defendants did not have legal title to said merchandise, but rather had a security interest in the nature of an equitable chattel mortgage.

II.

That said defendants perfected their said chattel mortgage within the meaning of Section 60-a (2) and 60-a (6) of the Bankruptcy Act on July 1, 1957, by any of the following acts:

(a) Taking of possession of said stock of merchandise.

(b) Securing the stipulation of bankrupts in the State Court proceedings, agreeing to a decree.

(c) Securing the decree of said State Court, declaring that said defendants were entitled to possession of said stock of merchandise.

III.

The legal effect of said decree of said State Court was to effect a foreclosure upon said merchandise of pre-existing equitable lien thereon.

IV.

The indebtedness due from said bankrupt to said

defendants, for which said transfer was made, was an antecedent indebtedness.

V.

Said transfer to said defendants, resulting in a depletion of the assets of said bankrupt, thereupon enabling said defendants to obtain a greater percentage of their indebtedness than other creditors in the same class.

VI.

That said decree and judgment of said State Court was not *res judicata* as to the rights of the trustee in bankruptcy in connection with this preference proceeding, but rather had the effect of fixing the date upon which the transfer of the property to defendants was perfected.

VII.

That said transfer of said stock of merchandise to said defendants was a preferential transfer, voidable in accordance with Section 60 of the Bankruptcy Act.

VIII.

Plaintiff is entitled to judgment for return of said stock of merchandise, or, in the event that defendants are unable to return said merchandise, for a decree and judgment for the sum of fourteen thousand seven hundred eighty-six and 17/100 (\$14,786.17) Dollars, with interest at six per cent per annum from October 4, 1957, until paid.

Dated this 9th day of January, 1959.

.....

United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed January 9, 1959.

————

Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Frank A. Dudley, Trustee, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment of the said United States District Court for the District of Oregon, entered herein on the 5th day of January, 1959, in favor of defendants and against the plaintiff, and from an order of said District Court entered in said cause on the 13th day of January, 1959, denying plaintiff's motion herein for amended and additional findings of fact and conclusions of law.

Dated this 30th day of January, 1959.

BOYRIE AND MILLER,

By /s/ F. BROCK MILLER,

of Attorneys for Appellant Frank A. Dudley,
Trustee.

I hereby acknowledge service of a copy of the within Notice of Appeal together with bond for

costs on appeal in Portland, Oregon, this 30th day of January, 1959.

/s/ MOE M. TONKON,

Of Attorneys for Defendants.

[Endorsed]: Filed January 30, 1959.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

1. The conditional sales contract between the Dickies and the Branches was, as to third parties and as to after-acquired merchandise, in legal effect, an unrecorded chattel mortgage.

2. Said unrecorded chattel mortgage was not valid as against attaching creditors until the rights of the Dickies were perfected by their taking of possession on or about July 1, 1957.

3. The legal effect of the State Court Decree was to effect a foreclosure of the said unrecorded chattel mortgage.

4. Said State Court Decree is not *res judicata* of the rights of the trustee in this preference suit.

5. Said State Court Decree determined only that said Dickies were entitled to possession of said mer-

chandise as against the bankrupts, and made no determination that said Dickies held title to said merchandise as against third party creditors, including the trustee in bankruptcy.

6. Said Dickies having consented to the commingling of the merchandise sold by them to the bankrupts, have the burden of pointing out the merchandise in the commingled mass which they sold.

7. Said Dickies failed to point out their merchandise and therefore lost whatever lien, if any, they held against the merchandise originally sold.

8. The trustee is entitled to judgment against the Dickies for the full amount of the merchandise received by them from the bankrupts, namely the sum of \$14,786.17, with interest at six per cent per annum from October 4, 1957, until paid.

Dated this 22nd day of May, 1959.

/s/ J. BROCK MILLER,
Of Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed June 1, 1959.

United States District Court, District of Oregon
In Bankruptcy
Civil No. 9425

FRANK A. DUDLEY as Trustee of the Estate
of Merle K. Branch and Wanda B. Branch,
Co-partners d/b/a Riddle General Store, Bank-
rupts,

Plaintiff,

vs.

CLIFFORD E. DICKIE and MARION E.
DICKIE, Husband and Wife,

Defendants.

Before: Honorable Gus J. Solomon, District Judge.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon—November 10, 1958

Appearances:

MESSRS. F. BROCK MILLER and
WAYNE ANNALA,

Of Attorneys for Plaintiff.

MR. MOE M. TONKON and
MR. LEO LEVENSON,

Of Attorneys for Defendants.

The Court: Call your first witness.

Mr. Miller: If the Court please, the plaintiff
will call Mrs. Ruth Paulus.

RUTH PAULUS

a witness produced in behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Miller:

Q. Would you please state your full name for the record? A. Ruth Paulus.

Q. What is your occupation, Mrs. Paulus?

A. Court Reporter.

Q. Are you an Official Court Reporter?

A. I am not an Official now.

Q. Have you been an Official?

A. Yes, I have.

Q. How long have you been a Court Reporter?

A. Nine years.

The Court: What difference would that make?

Mr. Miller: Just trying to establish her qualifications.

The Court: Is there any objection to her qualifications?

Mr. Tonkon: We will admit that this record was taken at [2*] that time. It was taken by the witness. It is true and correct.

Mr. Miller: First of all, let us have the record identified and marked for identification.

(Transcript of Proceedings in the Matter of Merle K. Branch and Wanda B. Branch, No. B-40999, was thereupon marked Plaintiff's Exhibit No. 1 for Identification.)

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Ruth Paulus.)

The Court: Now it is marked. Admitted.

Q. (By Mr. Miller): Handing you Plaintiff's Exhibit 1 for Identification, Mrs. Paulus, do you recognize the same? A. Yes, I do.

The Court: It is already admitted in evidence.

Mr. Miller: It is admitted into evidence?

The Court: Yes.

Mr. Miller: I didn't understand that. I thought he stipulated to her qualifications.

Mr. Tonkon: No, it is admitted.

Mr. Miller: That is all.

There is recited in the pretrial order, your Honor, certain exhibits which are not actually attached.

The Court: Do you want to offer them?

Mr. Miller: We are going to offer them.

The Court: Is there any objection? [3]

Mr. Tonkon: No objection.

The Court: Admitted.

Mr. Miller: They must be marked.

(The following documents were thereupon marked and received in evidence:

(Contract dated April 11, 1955, between Dickie and Branch—Plaintiff's Exhibit 2;

(Court file of Douglas County Circuit Court, No. 20195—Plaintiff's Exhibit 3;

(Copy of stipulation in Case No. 20195, County of Douglas, Oregon—Plaintiff's Exhibit 4;

(Original copy of Order in Case No. 20195—
Douglas County—Plaintiff's Exhibit 5.)

The Court: Call your next witness. [4]

WALTER BRITTELL

a witness produced in behalf of Plaintiff, having
been first duly sworn, was examined and testified
as follows:

Direct Examination

By Mr. Miller:

Q. Please state your full name for the record.

A. Walter Brittell.

Q. What is your occupation?

A. I am a public accountant.

Q. Where do you reside?

A. In Roseburg, Oregon.

Q. Did you know the bankrupts, Merle K.
Branch and Wanda B. Branch? A. Yes, sir.

Q. What was your relation to the bankrupts?

A. I was their accountant.

Q. For how long a period of time were you
their accountant?

A. During the entire period they operated the
store.

Q. In connection with your job, did you keep
their books for them? A. Yes, sir.

Q. Would that be including information as to
the purchases and sales made by the Branches
during their operation of the Riddle General Store?

The Court: Is there any dispute about these
books? [5]

Mr. Tonkon: We have looked at them. I see
no dispute about the books.

(Testimony of Walter Brittell.)

The Court: Will you admit they are true and correct copies?

Mr. Tonkon: If the witness says they are kept by him and true and correct, that is all right with us.

The Court: Are they?

The Witness: Yes, sir.

The Court: Is there any objection?

Mr. Tonkon: No objection.

The Court: Admitted.

(Ledger book above referred to was thereupon marked Plaintiff's Exhibit 6 for Identification and received in evidence.)

Q. (By Mr. Miller): From the set of books now can you tell us what the purchases and sales of the bankrupts were during the years 1955, '56 and '57? May I say you have prepared those and have it on a piece of paper, do you?

A. Yes, sir.

Mr. Miller: May he read it from his paper?

The Court: Yes. How many copies have you got?

Mr. Miller: Just one handwritten copy.

The Witness: Just one.

During 1955 the sales were \$56,366.85. The purchases were \$45,151.30.

During 1956 the sales were \$65,920.27, and the purchases [6] were \$49,005.99.

During 1957 the sales were \$14,289.76, and the purchases were \$10,970.95.

The figures of 1955 do not include the purchase of the original inventory.

(Testimony of Walter Brittell.)

Mr. Tonkon: Of what?

The Witness: They do not include the purchase of the original inventory.

The Court: The 1955 figures do not include that?

The Witness: No, sir; that is the purchases after the original inventory.

The Court: This was a general store?

The Witness: Yes, sir.

The Court: We could have told him he was going broke at the end of the first year. Obviously, if he bought this much and only sells \$56,000, he couldn't stay in business. Proceed.

Mr. Miller: That is all the questions I have, your Honor.

Cross-Examination

By Mr. Tonkon:

Q. Well, now, Mr. Brittell, is it Brittell?

A. Brittell; yes, sir.

Q. The year 1955, the purchases are only from April on—your sales?

A. Yes, sir; I think that is correct. Yes, it is. [7]

Q. That is the date the Branches acquired the stock of merchandise there in the store?

A. Yes, sir.

Q. In 1957 it is only for the period of six months? A. Yes, sir.

Q. May I see that book?

(Exhibit 6 presented to Counsel.)

(Testimony of Walter Brittell.)

Q. Where in this book do you get purchases, from what pages?

A. From two sources, sir. One is on the register where the checks are entered, and the other one—

The Court: Mr. Tonkon, bring that up to him.

(Document presented to the witness.)

Q. (By Mr. Tonkon): Let me withdraw that question. First, where in this ledger—it is called a ledger, isn't it, this book? A. Yes, sir.

Q. Where in the ledger are the sales that you have just enumerated as having been made by the store in 1955, '56 and '57? Where do they appear?

A. They are posted to this sales page in the ledger, and they come originally from the pages of the cash transactions book in the income register.

Q. In other words, this is the basic book?

A. This is the journal of original entry.

Q. As in the cash register, you call it? [8]

A. Yes, sir.

Q. Where you allocate it to sales and cash received? A. That is correct.

Q. Then that is transferred over to this page, to sales by the day, by the month, or whatever?

A. By the month; yes, sir.

Q. By the month. What about the purchases? Where in the book are the purchases?

A. The purchases are the same source, from this cash register and from the check register, and they are posted to the merchandise inventory account in the general ledger.

(Testimony of Walter Brittell.)

Q. Where is the merchandise inventory?

A. This account right here (indicating). This is the original inventory. This is subsequent purchases. These amounts on the credit side are amounts that this account was reduced to for cost of merchandise that was sold.

Q. You say you tried to arrive at that?

A. I made entries in these records every month on a month-to-month basis by an estimate at the end of the year by the use of an inventory figure.

The Court: Actual inventory?

The Witness: Yes, sir.

Q. (By Mr. Tonkon): At the end of each month you had no way of knowing by that cost of sales what items were actually sold, whether it was newly acquired merchandise or old merchandise; [9] no way you could tell from that, was there?

A. No, sir.

Q. When you took your physical inventory at the end of the year was there any way you could tell whether the merchandise was new or old merchandise? A. I didn't take the inventory.

Q. You didn't actually take an inventory?

A. No, sir.

The Court: Did you have any mark-downs for obsolescence or old merchandise? Did they have a system whereby merchandise on the shelves for more than a year would be reduced when they took the inventory?

The Witness: I believe that they did, sir. That

(Testimony of Walter Brittell.)

is quite a common procedure; however, the inventory figure was given to me.

The Court: You don't know whether that was cost price plus a third or whether they took the mark-down?

The Witness: No, sir; I do not.

Q. (By Mr. Tonkon): Do I understand that the item you have given us as purchases is identical to cost of sales?

The Witness: No, sir; it is not.

Q. Wherein is it different?

A. It would differ from the cost of sales by the amount that the inventory went up or down actually in a year's time.

Q. I do not follow you on that. [10]

A. Well, if you—in operating a business of this kind or of any kind, if you start with the inventory at the beginning of the year of, we will say, \$10,000 and at the end of the year your inventory is exactly \$10,000, then the purchases and the cost of goods sold would be the same figure. However, if the inventory at the end of the year differed from inventory at the beginning of the year, then the cost of sales and the merchandise purchases would differ by that same amount.

Q. Then the figure you have given us is only for purchases. It does not reflect anything with reference to cost of sales?

A. No, sir; those are purchase figures.

Q. You have stated, I believe, that you were unable to determine each month when you made the

(Testimony of Walter Brittell.)

entries from the register of the journal to the purchase inventory page as to whether it was new or old merchandise that was sold?

A. That statement is correct. I could not.

Q. You have no way of knowing?

A. No, sir.

Mr. Tonkon: No further questions.

The Court: Are you going to offer the income tax statements?

Mr. Miller: I can. I will be glad to.

The Court: In your figures did you use month by month to determine the cost of sales?

The Witness: I would have to look at that to be sure. If [11] my memory serves me correctly, and it has been quite a while since I have looked at those or done it. I used, I believe, 75 per cent for cost of merchandise sold during the first year, and I believe that after that time I used the percentage that applied during the first year. I usually do that where I am estimating on a month-to-month basis. I use the percentage figure that was between two lines, two inventory figures, and will use that again until another inventory was taken as the best estimate I have.

Q. (By Mr. Tonkon): Wasn't there a mark-up of a third? A. Sir?

Q. So instead of 25 per cent you just said you use cost of sales?

A. I believe I did. I don't recall. I have not looked at those records, not worked on them.

(Testimony of Walter Brittell.)

Q. Can you look at them and see whether it was a third or a fourth?

The Court: Will that take you some time?

The Witness: No, sir; it should not. The figures the first month are $71\frac{1}{2}$ per cent, is what I used.

Q. $71\frac{1}{2}$?

A. Yes, sir; that is the cost only.

Q. Somewhere between a fourth and a third?

A. Yes, sir.

Q. Thank you. [12]

Redirect Examination

By Mr. Miller:

Q. Mr. Brittell, do you have those income tax returns there for 1955 and '56?

A. They are here on the Clerk's desk.

Q. Have they been marked?

The Court: Is there any objection to their admission?

Mr. Tonkon: No.

The Court: Did you make them, prepare them?

The Witness: Yes, sir; I did.

The Court: All right; admitted.

(United States Individual Income Tax Returns for the Years 1955 and 1956 were thereupon marked Plaintiff's Exhibits 7 and 8 for Identification, respectively, and received in evidence.)

Q. (By Mr. Miller): On the income tax re-

(Testimony of Walter Brittell.)

turns, the amount of purchases and sales for each of those years is stated; are they not?

A. Yes, sir.

The Court: Do they correspond with your books?

The Witness: Yes, sir; they do.

Mr. Miller: That is all I have of this witness.

(Witness excused.) [13]

Mr. Miller: I would like to ask Counsel to stipulate to some things; that the balance owing on the defendants' contract on June 12, 1957, was the sum of——

The Court: Is that all admitted in the pretrial order?

Mr. Miller: I believe it is not, your Honor. That is why I want it in. It is contained on the Exhibit 3. That is incorporated——

The Court: Call your other witnesses. Introduce that later.

Mr. Miller: I have one of the bankrupts. She lives in Riddle, Oregon. I called her about ten days ago to advise her the date was the 10th. I couldn't be certain. Mrs. Mundorff later advised us she was not at all certain it was the 10th. I called Mrs. Mundorff on the 6th. She advised me it would be the 10th. I tried to reach the lady by telephone, reached her only by the telephone at 6:30. She promised to be on her way up. That is all the witnesses I have except for Mr. Branch, one of the bankrupts.

Mr. Tonkon: Well, now, we have discussed the impropriety in the pretrial order, the Agreed Statement of Facts, and we can have them corrected before we proceed.

Paragraph IX appearing on Page 3 of the pretrial order, we would like to have the words “* * * that said defendants were entitled to foreclosure of said contract” eliminated because the stipulation speaks for itself, and there is nothing [14] in the stipulation about any foreclosure.

The Court: Very well. That is all right.

Mr. Tonkon: It should read, “That on or about July 1, 1957, the said bankrupts stipulated in writing in said suit, in said Circuit Court, in accordance with Exhibit ‘D’ on file herein”——

The Court: You want to strike “said defendants were entitled to said foreclosure of said contract”?

Mr. Tonkon: Right.

The Court: It is stricken. Are there any other changes in the pretrial order? Otherwise, I am going to sign it.

(Thereupon, the Court signed the pretrial order.)

The Court: Do you know what you want him to stipulate to now?

Mr. Miller: Yes, your Honor; I want to stipulate as to the balance owing to the defendants from the bankrupts on June 12, 1957.

The Court: Yes; how much?

Mr. Miller: If I can be handed the complaint

and summons which were put in evidence, I could give the Court the figure.

The Court: Don't you know what it is, Mr. Tonkon?

Mr. Tonkon: I have a rough idea.

Mr. Miller: It is approximately \$16,000.

The Court: Do it during the lunch recess. Figure that out. [15] Call your first witness, Mr. Tonkon.

CLIFFORD E. DICKIE

a Defendant, called in behalf of Defendants, having been first duly sworn, was examined and testified as follows:

The Court: Mr. Dickie, you are one of the defendants in this case?

The Witness: Yes, sir.

The Court: Where do you live?

The Witness: 7412 Beaverton-Hillsdale Highway.

The Court: In Portland?

The Witness: Yes, sir; Raleigh Hills.

Mr. Tonkon: Your Honor, my associate has some idea that we are going to be put at a disadvantage if this witness, our witness—we have two witnesses to go on the stand, but prior to that we would——

The Court: You have convinced me. About what time is your witness going to show up? (To Mr. Miller.)

Mr. Miller: She was supposed to be here. I suppose she ought to be here by now.

The Court: We will start at 2:00 o'clock.

Mr. Tonkon: Maybe your Honor wants to hear some of the legal aspects, or do you want to wait until it is all over?

The Court: I think that is best, that we hear the case and [16] the legal arguments after.

I wanted to say that I had some grave doubts as to whether a conditional sales contract was appropriate in a transaction of this kind, and I would agree with Mr. Miller that this is really an unrecorded chattel mortgage, but I am disturbed about the decree that was entered and whether or not I am bound by that decree. That is one of the things that complicates the issue. If there was no decree, I think probably Mr. Miller would have a pretty good case.

Mr. Tonkon: Well, that is another point I would think only as to certain facets as to the after-acquired property. There is a factual proposition—

The Court: As to the fixtures?

Mr. Tonkon: As to the fixtures, as to the actual merchandise, we will have proof to dispel any idea that at the time that they took over in July of 1957 there was only newly acquired merchandise in there, or if they had merchandise in the premises at the time they repossessed it in July it was left there originally under the conditional sales contract, why, they would be entitled to have that, but that even does not constitute the stock. Your point on the matter of whether it is a chattel mortgage, we want to be heard on that.

The Court: I am not making any final determination. I think Mr. Miller does not want to reach that question himself. I think he has some clients that enter into similar agreements. [17]

Mr. Miller: I have submitted a brief in that, and the only thing I can say about that subject matter, if I am confused, the Oregon Supreme Court is confused. I am not sure what the law—I will be quite candid—I have briefed it to this extent. There is no case in Oregon on a conditional sales contract on an open stock of goods.

Mr. Tonkon: Is there anywhere?

Mr. Miller: Yes; there are. I can give you some. There are many chattel mortgage cases. There is not one, to my knowledge, and I have read them all, in which the Oregon Supreme Court upheld a chattel mortgage on a fluctuating stock of goods, on a chattel mortgage where one definitely was not recorded.

The Court: When was this conditional sales contract recorded?

Mr. Tonkon: It was recorded, but we are not holding anything for its recordation. In the first place, the Clerk had no business recording it. It was not acknowledged. In the second place, it was recorded about ten days before we took possession. In Oregon a conditional sales contract does not have to be recorded, but these people elected to do business on that basis. Now that is it. Now, just because the Supreme Court has held in many cases that you have to record a chattel mortgage to have it valid, that does not disturb our position.

The Court: You do not have to convince me on that. The only question is: Is a conditional contract, or has a [18] conditional sales contract of an open stock of merchandise been construed as an unrecorded mortgage? I think many states do.

Mr. Miller: Of course, we have got the case of Davis vs. Wood, which I cited to your Honor in 200 Oregon, and in which the Oregon Court, I thought, bespoke itself for once in plain language and said they would not consider such documents as conditional sales contracts; only as unrecorded chattel mortgages.

Of course, there are two possibilities from the plaintiff's standpoint here. One of those, of course, is that an alleged conditional sales contract on an open stock of merchandise is in the same category as a mortgage on an open stock of merchandise and, therefore, is no better than the chattel mortgage. That is one theory. The second theory is this: That is, that this conditional sales contract says I am selling you X items. Then it goes on to say you are to go out and buy and then I am to have security for the indebtedness due on X on items Y and Z.

I tried to give your Honor numerous decisions but certainly not all on this point; but when you start——

The Court: You do not have to convince me on that. Are you contending that you acquired a lien on after-acquired purchases?

Mr. Tonkon: No. [19]

The Court: They do not make that contention.

Mr. Tonkon: No, we say that that contract was very clear.

Mr. Miller: They say they owned it.

Mr. Tonkon: Right.

Mr. Miller: That's right; they don't say they had a lien. They say they owned it; that it would rise above a lien.

The Court: That is even worse.

Mr. Tonkon: Why?

The Court: Do you mean you declare that when Merle Branch and Wanda Branch in 1956 and 1957 purchased a plow or some shirts that you became the owner of it?

Mr. Tonkon: That is what the contract says; that is what the contract says.

The Court: Mr. Tonkon, did you draw that contract?

Mr. Tonkon: No, but that is what the contract says. We have these cases involving automobiles that are on conditional sales contracts. A fellow puts a radio on, he puts a tire on, he puts a headlight on, something like that, and they become part of the——

The Court: Do you mean to say that when a person puts a tire on that it belongs to the owner?

Mr. Tonkon: Right.

The Court: Have you ever tried any of those cases?

Mr. Tonkon: No, but the conditional mortgagee has the same right as against this as the other tires they took off. [20]

The Court: I tried one of those cases. They got the tires back.

Mr. Tonkon: It was not because of the actual lien. I am talking about the lien rights.

The Court: I do not think that does it.

Mr. Tonkon: This agreement clearly says that.

The Court: That is what it says.

Mr. Tonkon: He is saying in so many words by virtue of the authorities he has cited that the whole agreement is invalidated because it affects after-acquired property.

The Court: They are trying to do by a conditional sales contract what ordinarily is done by a chattel mortgage on a fluctuating stock of merchandise. I have grave doubts as to whether that can be done by contract.

(Noon recess taken.) [21]

Afternoon Session

(Proceedings herein were resumed at 2:00 p.m. of the same day, pursuant to the noon recess, as follows:)

The Court: Call your next witness.

Mr. Miller: If the Court please, the plaintiff will call Mrs. Branch.

WANDA B. BRANCH

called in behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Miller:

Q. Mrs. Branch, please state your full name.

A. Wanda Bernice Branch.

Q. You were one of the bankrupts along with your husband, Merle Branch, in this proceeding?

A. I was.

Q. In other words, of the operation of the Riddle General Store you were one of the copartners; is that right? A. That's right.

Q. Did you in fact from day to day take part in the operation of that business?

A. I did. [22]

Q. In other words, you were generally there working in the store? A. Yes, sir.

The Court: What did you do in the store?

The Witness: I was clerking, and there was only the two.

The Court: You and your husband?

The Witness: Yes.

The Court: You helped buy merchandise?

The Witness: Helped buy merchandise.

The Court: Did you know what was purchased?

The Witness: I did, yes.

The Court: Will you first tell us what kind of a store it was, what some of the items were?

The Witness: It was a general store, and it had

(Testimony of Wanda B. Branch.)

paint, hardware, shoes, wearing apparel, notions; just a general store.

The Court: Groceries?

The Witness: No; no groceries.

The Court: Men's and women's clothing?

The Witness: Yes.

The Court: Work clothes?

The Witness: Work clothes and things, yes.

The Court: Farm implements?

The Witness: No; no farm implements; appliances.

The Court: Electrical appliances? [23]

The Witness: Yes.

The Court: Furniture?

The Witness: No furniture.

Q. (By Mr. Miller): You had plumbing and hardware, too, did you not? A. Yes.

Q. You started the operation of the store, I believe, some time in April of 1955; is that correct?

A. That is correct.

Q. And continued the operation until approximately July of 1957? A. That is correct.

Q. During that period of time did you make your purchases from month to month of various items of merchandise? A. We did that.

Q. When you purchased these items of merchandise, what did you do with them?

A. Well, we put them out for resale.

Q. Did you keep segregated the new items purchased from the old stock?

A. No; we didn't do that.

(Testimony of Wanda B. Branch.)

Q. You started your store out with a stock of merchandise, as I understand it. Is that right?

A. We did.

Q. Which was purchased from, I believe, the defendants in this [24] proceedings?

A. That's right.

Q. And thereafter you periodically bought new merchandise? A. We did.

Q. Is your answer that you did not segregate the new merchandise from the old?

A. No; we did not.

Q. What did you do with it?

A. We mixed it with the other. We put it on the shelves.

Q. Were you ever instructed by the defendants in this proceeding not to mix the new merchandise with the old? A. Never.

The Court: Does the contract so provide, that the new merchandise will be kept separate?

Mr. Miller: It does not, your Honor. I have some law on the subject, but I thought as long as we had her here we would bring it out.

Q. You were in the store until approximately July 1, 1957? A. That is correct.

Q. Can you tell us, was all the merchandise there at that time, was that all new merchandise, or was it all old merchandise?

Mr. Tonkon: Your Honor, I must object to the type of questions Counsel is asking. They are leading. He should ask—I mean he should let the witness do more answering.

(Testimony of Wanda B. Branch.)

The Court: I don't think that that was very much of a [25] leading question. Go ahead. Do you understand the question? Just before you closed up or the defendants filed that action against you and your husband, how would you compare the old merchandise that was in there at the time you purchased the store with the amount of new merchandise that was in there?

The Witness: I would say there was at least half of it was new. At least half of it was.

The Court: At least half of it?

Mr. Levenson: I didn't hear.

The Witness: At least half of it was new merchandise.

The Court: In other words, quite a bit of the merchandise which you had originally purchased from Mr. and Mr. Dickie was slow-moving merchandise and merchandise that didn't sell at all?

The Witness: That is correct.

The Court: Will you tell us what kind of merchandise that was that didn't sell?

The Witness: Well, there was—well, hardware, it moves fast.

The Court: Hardware is a good seller?

The Witness: Yes.

The Court: So most of the hardware you would say that you purchased from the Branches had been sold by June, by the time that they filed the action against you?

The Witness: Well, I don't know that most of it, but there was quite a bit of hardware, yes. And

(Testimony of Wanda B. Branch.)

then there was men's [26] work clothes. They sell pretty fast. Well, appliances don't move real fast, electrical appliances, things like that.

The Court: As I understand it, you and your husband took over this store in 1955?

The Witness: That's right.

The Court: Do you remember what month?

The Witness: April.

The Court: April; and you purchased—in that purchase there was quite a bit of merchandise; is that correct?

The Witness: Yes; there was.

The Court: There was electrical appliances and hardware and men's work clothes and all that type of merchandise?

The Witness: Yes.

The Court: Do you recall how many appliances there were when you acquired the store?

The Witness: No; I do not.

The Court: Did you sell any appliances in the two years that you had the business?

The Witness: We sold some.

The Court: Did you buy any more appliances, new appliances?

The Witness: For the store?

The Court: Yes.

The Witness: Well, they don't move too fast, and we had a floor plan, and there was that setup.

The Court: In other words, as far as the appliances were [27] concerned, those appliances that remained in the store in 1957 were the ones that

(Testimony of Wanda B. Branch.)

you took over when you purchased the store from the Dickies?

The Witness: No; there was appliances there that we had and that were in the store that we put in, and we had television in there, too.

The Court: What about that, then?

The Witness: The television, the floor appliances and the appliances, in a certain amount of time we had to pay for those.

The Court: The people who had television there had it on floor plan, and they took their television back, didn't they?

The Witness: I do not remember. I think they were still there.

Mr. Miller: They probably took them back after she vacated the store.

The Witness: I think so. I think they were there when we left the store.

The Court: Do you recall any of the appliances in 1957 that were there in 1955?

The Witness: There was Youngstown sink.

The Court: Yes?

The Witness: It was there when we left. It was there when we bought the store. It was there when we left.

The Court: That is one item. Were there any refrigerators there in 1957 that were there in [28] 1955?

The Witness: No.

The Court: No refrigerators. Any radios, washing machines?

(Testimony of Wanda B. Branch.)

The Witness: No.

The Court: What was there in 1957 that was there in 1955 in the line of electrical appliances?

The Witness: Oh, I don't know; I couldn't answer that. I don't know. I couldn't answer that. I don't remember. I will have to think a minute.

The Court: Have you got a list of the items that were taken in 1957?

Mr. Miller: No, your Honor, I have neither a list of items in 1955 nor any in 1957.

Q. Mrs. Branch, was an inventory taken when you vacated the premises?

A. No; there wasn't.

Q. July 1, 1957? A. No.

Q. Did you take a physical inventory when you moved in in April, 1955? A. No; we did not.

Q. Do you know whether one was taken either of those two dates? A. No; I do not.

Q. How about the hardware, then? Were there quite a few items that you purchased in 1955 in the store in 1956? [29]

A. Well, it was small hardware, and it would be sort of hard—I couldn't say that either. We purchased new hardware all the time.

The Court: Were there some slow-moving items in hardware that didn't sell very well, that would lay over for two years, about two years approximately, or two and a half?

The Witness: Well, I know there was pots and pans and there was spatulas and things along that line that didn't—that's all I can—

(Testimony of Wanda B. Branch.)

The Court: There were pots and pans and some spatulas?

The Witness: And things like that.

The Court: That were there in 1957, that you acquired?

The Witness: Yes.

The Court: Do you know approximately how many?

The Witness: I mean they were there in 1955 when we purchased the store.

The Court: They were there in 1957?

The Witness: They were just things like that, and I couldn't say on the real hardware line. I couldn't say.

The Court: You had started with one-half of your hardware stock, or one-third or one-fourth?

The Witness: Well, hardware, I guess we got our paints and things along that line when we had Kem-Tone paints that they didn't have in the store. We put that in the store after we purchased it. [30]

The Court: What kind of paint did they have?

The Witness: Pittsburgh paint.

The Court: How much Pittsburgh paint did you have in 1957 when they took the store back?

The Witness: I couldn't say.

The Court: Was there quite a bit?

The Witness: There was quite a bit.

The Court: There was quite a bit?

The Witness: Yes; there was.

The Court: Was that the Pittsburgh paint that was there when you acquired the store?

(Testimony of Wanda B. Branch.)

The Witness: No; we purchased the Pittsburgh paint all the time we were there.

The Court: Was there any Pittsburgh paint that you acquired originally that was there when you gave up the store?

The Witness: I imagine there was some gallons that were there. The gallons, they don't move as fast.

The Court: How much? Was there one-third the stock, one-fourth the stock?

The Witness: I couldn't say.

The Court: The Kem-Tone paint, was that your biggest seller, or did you have more Kem-Tone than you had Pittsburgh when you closed up?

The Witness: No; we didn't have more Kem-Tone. We had a lot of Kem-Tone in there. [31]

The Court: Half Kem-Tone?

The Witness: I would say.

The Court: How about men's work clothes? Did you have many of the items that you originally acquired at the time you closed it?

The Witness: Well, we had some sales to do away with that.

The Court: Sales? What do you mean?

The Witness: Well, to try to move some of the old stock.

The Court: Mrs. Branch, I am not trying to criticize you. I am just trying to find out what items were in the store. This is a legal proposition.

The Witness: Yes; I understand.

The Court: What items did you have in the

(Testimony of Wanda B. Branch.)

store in 1957 at the time you closed up or at the time they filed that action against you that you had when you bought the stock from Mr. and Mrs. Dickie? That is all we want to know.

The Witness: Well, I couldn't say because there is too many articles in that store. It is just a general store, and I couldn't say.

The Court: In 1955 I understand you bought \$45,000 worth of merchandise. Is that correct?

The Witness: Well, if the records are in the books, that is correct.

The Court: Was that general merchandise of all kinds that you bought? [32]

The Witness: Yes, sir.

The Court: Was there a lot of merchandise that you took over from Mr. and Mrs. Dickie that you never sold at all in the two years?

The Witness: Yes; there was stock there that didn't sell any too easy.

The Court: That is precisely the thing I want to talk to you about.

Mr. Tonkon: We didn't hear that.

The Court: She said there was quite a bit of merchandise. Let me repeat that. I understand that there was quite a bit of merchandise in 1957 when the store was closed up, that you originally purchased from Mr. and Mrs. Dickie?

The Witness: Well, I would say there was at least half new merchandise in the store when we left it, and it was the old stock, yes.

The Court: It is your best judgment that one-

(Testimony of Wanda B. Branch.)

half of the merchandise that you had in 1957 was merchandise that you originally purchased from Mr. and Mrs. Dickie in 1955?

The Witness: Would you repeat that again, please?

The Court: Is it your best judgment that in 1957, July 1st, July 1, 1957, you had quite a bit of merchandise in the store, didn't you?

The Witness: Yes, sir.

The Court: Would you say that one-half, approximately [33] one-half of that merchandise was merchandise that you purchased in 1955, not from any dealers?

The Witness: Yes, sir.

The Court: But from Mr. and Mrs. Dickie?

The Witness: I would say that.

The Court: All right. That is all I want to know.

Q. (By Mr. Miller): As I understand it, this Kem-Tone paint is made by Sherwin-Williams Paint Company; is that right?

A. That's right.

Q. Did I understand you to say you had some on hand at the end, that is, July 1, 1957, but you didn't acquire any of that from the Dickies?

A. No; we didn't acquire that from the Dickies.

Q. But you had some on hand?

A. Yes; we did have.

Q. Were there other items that you had on hand at the end that you didn't have at the beginning other than general classes of items?

A. Well, there was a drier there that I remem-

(Testimony of Wanda B. Branch.)

ber that we didn't—you can't distinguish because it is a store show, just what the——

The Court: Did you deal with the same suppliers that Mr. and Mrs. Dickie dealt with?

The Witness: Most all were the same suppliers.

The Court: Would you say that there was a considerable [34] amount of merchandise that was obsolete at the time you purchased it, that couldn't be sold?

The Witness: That's right.

Q. (By Mr. Miller): I was going to ask you, actually, is it possible for you, even if you saw an inventory, to tell which of the merchandise was purchased originally from the Dickies and which might have been purchased at a later date from a supplier? A. No; you couldn't tell.

Q. Is that because the merchandise in general was purchased from the same people?

A. That is correct; that's right.

Q. Same type of merchandise?

A. That's right.

Mr. Miller: That is all.

The Court: Mr. Tonkon?

Cross-Examination

By Mr. Tonkon:

Q. Mrs. Branch, at the time you and Mr. Branch took over the store from the Dickies there were very little, if any, appliances in the premises, were there? A. No.

Q. Your answer is what?

(Testimony of Wanda B. Branch.)

A. No; I don't recall any appliances; only that Youngstown [35] Kitchen.

Q. As a matter of fact, during the time you operated that store and you started this appliance business on a bigger scale, you floored all your appliances there; isn't that right?

A. That's right.

Q. That means that you had somebody loan you the money on a particular appliance, and when you sold it, you would repay that; is that right?

A. It was a floor plan; yes, sir.

Q. When the business was closed and the Dickies took it back in July, 1957, that money was still owing on the appliances; is that right?

A. If there was anything in the store, all with the exception of the drier, and it was paid for.

Q. Yes, but all the other appliance items, there was something outstanding on them?

A. I am sure there was.

Q. When you bought merchandise during the time you and Mr. Branch operated the store there, you bought such merchandise as you thought would be readily salable? A. That is correct.

Q. What would you say as to whether or not the merchandise you bought after you went into possession back in April, 1955, was more readily salable than the merchandise that was there prior to that time that you acquired from the [36] Dickies? A. What I would say?

Q. Would you say it was more salable?

A. I do; yes, sir.

(Testimony of Wanda B. Branch.)

Q. In other words, the new merchandise moved out more quickly than the old merchandise?

A. Well, there is a certain amount of anything that you buy that does not move.

Q. But, as a rule, you would say that most of the new merchandise moved out very quickly?

A. Well, there is—it did, and then there was some—it's just like anything you buy.

Q. I can understand if you bought a hundred dollars worth of shoes some of them would remain, but, as a rule, would you say 90 per cent of it might go out, \$90 out of \$100 would be sold very quickly?

A. I would not say that much, no. That's too much of a per cent.

Q. This stock that you acquired in April, 1955, contained a lot of staple items, would you say?

A. I would say.

Q. Items that were necessary for general stores of that character? A. That is correct.

Q. Some of which you might sell and some of which you might not sell for a year or two years hence, depending upon a want [37] for the particular item; is that right?

A. You mean is that what we purchased?

Q. No, no. When you bought the store from the Dickies, it had certain types of merchandise in there that you might be able to sell today and you might not be able to sell for a couple of years because it was a necessary staple item in a store of that character.

The Court: I think she said about 50 per cent

(Testimony of Wanda B. Branch.)

of the merchandise that was originally acquired was still in the store at the time they took it back.

Mr. Tonkon: Well, now, I want the witness to be understood to have said also, and I think she has, that the merchandise she purchased more recently was the merchandise that went out of the store more quickly.

The Court: That would necessarily be true, Mr. Tonkon. If she purchased \$136,000 worth of merchandise and she still had \$11,000 worth of merchandise that was originally purchased, that would necessarily be the case.

Mr. Tonkon: As long as your Honor understands it.

Q. As I understood, Mrs. Branch, you said you didn't take an inventory either at the commencement of your operation in April, 1955, or when you turned over the possession pursuant to the Court's decree in July, 1957.

Mr. Miller: I object to that portion of the question which refers to the Court's decree. [38]

The Court: That does not establish anything anyway. He is just fixing the time.

Mr. Tonkon: Would you read the question, Mr. Reporter?

(Last question read.)

The Witness: We didn't take an inventory either dates. We took an inventory between, of course, but not on those dates; not on anything prior, no.

(Testimony of Wanda B. Branch.)

Mr. Tonkon: That is all with this witness.

The Court: That is all.

Redirect Examination

By Mr. Miller:

Q. The inventory which was taken, was it broken down so that when it is read you could tell which items were still on hand? A. No.

Mr. Tonkon: She said she didn't take an inventory, your Honor.

Mr. Miller: She said she took inventories in between.

Q. Now, the inventory which was taken, how would you go about taking it?

Mr. Tonkon: Would you please identify which inventory?

The Court: Do you have those inventories?

The Witness: The inventories?

Mr. Miller: They are in my office, your Honor. They are of no value here. [39]

Mr. Tonkon: That is all I am trying to establish as to that.

The Court: You do not have to establish that. He agrees.

Mr. Miller: No further questions.

Mr. Tonkon: What am I agreeing to, your Honor?

The Court: Those inventories are of no value.

Mr. Tonkon: That is all right.

The Court: You and the Dickies are not unfriendly to each other, are you?

(Testimony of Wanda B. Branch.)

The Witness: Well, I don't know. We are really friendly, but there is, I suppose, feeling there. I don't know.

Recross-Examination

By Mr. Tonkon:

Q. Prior to April, 1955, when you purchased the store from the Dickies, had either you or both you and Mr. Branch been connected with the store in any way?

A. Yes, sir; I worked in the store.

Q. How long?

A. I worked approximately two years.

Q. Two years?

A. A year and a half with the Dickies. I worked in the store.

Q. I can't hear you.

A. I worked in the store a year and a half before buying the store. [40]

Q. Did Mr. Branch work in the store?

A. No; he did not.

Q. You were thoroughly familiar with the contents of the store, as to how it was operated, and everything? A. Not, no; no, I wasn't.

Q. What did you do in the store prior to that time?

A. I was a clerk, and you don't know the business of the store when you are a clerk.

Q. You knew what was being sold there, though? A. Yes, sir.

(Testimony of Wanda B. Branch.)

Q. You sold all the merchandise in the store, not any particular department?

A. No, I sold—it was a general store. I was all over the store; yes, sir.

Q. Did you prior to April, 1955, when you were an employee there, did you price some of the merchandise? A. Oh, yes.

Q. In other words, you would take the prices off the invoice, and the mark-up was explained to you?

A. I marked the merchandise and put it on the shelf.

Mr. Tonkon: I think that is all.

Mr. Miller: No further questions.

(Witness excused.)

Mr. Miller: If the Court please, Counsel for defendants and [41] I wish to stipulate that the balance owing from the Branches to the Dickies on June 12, 1957, which would also be true on July 1, 1957, was the sum of \$16,697.17, and that the original sale price of the store was \$30,000, and that the contract—and this is in evidence—fixes the value of the fixtures at \$2,000.

The Court: All right. Is there an agreement on the value of the merchandise that was taken back?

Mr. Tonkon: We are going to have evidence on that with the inventory, your Honor.

Mr. Miller: It is an agreed fact in this proceeding, your Honor, that the inventory was in the amount of \$14,786.17. That is Agreed Fact No. 10.

The Court: How do you arrive at that figure?

Mr. Tonkon: We have the actual inventory taken.

The Court: Fair market value or original cost?

Mr. Tonkon: I would like the witness to explain it. We will put on a witness at the proper time who took it.

Mr. Miller: If the Court please, that concludes plaintiff's case in chief.

I might just state to your Honor that I have put on no particular evidence in this suit as to reasonable cause for belief of insolvency, except as it appears on the exhibit, the sworn complaint of the defendants in the Circuit Court proceedings; that there were certain things wrong; that they knew about [42] that.

Mr. Tonkon: We will save time on that. Defendants will admit that on the date that they acquired possession that they had reasonable cause to believe that the bankrupts were insolvent.

Mr. Levenson: Your Honor, we would like to move for a judgment—or a directed verdict if there is such a thing in the Federal Court, or summary judgment, on the ground that the plaintiff has not established his case that there was a transfer in violation of the Bankruptcy Act.

The evidence up to now, considering the exhibits here, shows that the plaintiff was the owner of everything in the store.

The Court: As of what date?

Mr. Levenson: As of the date of the judgment of the Circuit Court of the State of Oregon.

The Court: Yes, but isn't that often the case in a bankruptcy, that they were owners for three months or four months?

Mr. Levenson: In our judgment, your Honor, this was not a judgment establishing a lien, your Honor. The judgment was based upon a cause of action for declaratory relief in which the Court was asked to declare the plaintiffs to be the absolute owners of the furniture, fixtures, and stock of the merchandise.

The Court: Does the title that you give to an action make very much difference? Wasn't it actually a foreclosure of the [43] lien? That is what you usually do in a conditional sales contract.

Mr. Levenson: In certain kinds of cases the Court may go to the pleadings to see what the issues were, but the issue in the case, if you look at the prayer in that case—I don't have it handy.

The Court: What difference does that prayer make?

Mr. Levenson: It was an adjudication that the plaintiffs are the owners of that merchandise, and the Court so found. There was no appeal from that.

The Court: Was this a contested case?

Mr. Levenson: Which case?

The Court: Was that case a contested case?

Mr. Tonkon: Your Honor, I don't see what difference it makes whether it was contested. You cannot go back of the decree under the theory my associate has advanced; furthermore, the decree in and of itself exempts, so far as the title of the defendant in this action, the plaintiffs in that suit,

or anybody that was on the premises because it applied to someone else so it is our contention that once that court has entered its decree in that suit determining we are absolute owners of all the inventory and the assets there, that this Court has no right to examine it. It isn't a question of giving us a lien, was that correct? All the matters involved in the suit, whatever may be the nature of the suit, are merged in the decree [44] that gives us the title as to the property. That is our position. I am prepared to cite law.

(Discussion between Court and Counsel.)

The Court: Mr. Tonkon, I am going to take your motion under advisement until I have an opportunity to look at it. Call your first witness. [45]

MARION E. DICKIE

a Defendant, called in behalf of Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tonkon:

Q. What is your full name?

A. Marion Elizabeth Dickie.

Q. You are one of the defendants in this action?

A. Yes; I am.

Q. Your husband is the other defendant?

A. Yes.

Q. When did you and your husband first acquire the Riddle General Store at Riddle, Oregon?

A. Do you mean when we bought it?

(Testimony of Marion E. Dickie.)

Q. When did you buy it? A. 1948.

Q. Did you and your husband operate that continuously until what date?

A. 1955, in April.

Q. That is about the time you sold it to the Branches? A. Yes.

Q. Were you active in the operation of the store? A. Yes.

Q. Your husband was with you?

A. Yes. [46]

Q. I think you heard the testimony of Mrs. Branch that she worked for you about a year and a half? A. I think it was a little longer.

Q. As I understand it, this was a general merchandise store; is that right? A. Yes.

Q. How many such stores were there in Riddle?

A. Well, there was one across the street; however, they carry groceries, which we didn't, but they had a scattering of general merchandise.

Q. They were not exclusively general merchandise like yours?

A. No; there wasn't any other store in Riddle just like our store.

Q. What does the community depend upon for its real business?

A. Do you mean the real business?

Q. Yes.

A. They have the mine. They opened up the mine after we were there, but it was lumber mostly.

Q. Lumbering? A. Yes.

Q. About how many people in the city?

(Testimony of Marion E. Dickie.)

A. Well, mostly that varied. It was one of these little boom towns. When we went there, there weren't so many, but at the time we sold I think the population probably had almost trebled. Now that's a pure guess. [47]

Q. You have not given me any figure to what it was trebled?

A. I couldn't say. It seems like it was 600 people right in the city limits.

Q. Somewhere between 600 and 1,000, would you say?

A. Yes.

Q. Now, Mrs. Dickie, in April, 1955, you agreed to sell your store to the Branches, Mr. and Mrs. Branch?

A. Yes.

Q. What was the reason you were selling the store?

A. Because of my husband's health.

Q. What was the matter with your husband?

A. He had had a heart attack.

Q. It was necessary for you——

A. To dispose of the store. It was too much for me to take care of.

Q. Tell us generally how you arrived at a price of the sale with the Branches?

A. Well, they asked us to buy the store and wanted to know how much down, and so we were surprised that they wanted it. I mean, we had not been pushing the sale of the store but just sort of hand-to-mouth advertising with our wholesale houses, and so all of a sudden Mrs. Branch approached us with the idea that they might like to

(Testimony of Marion E. Dickie.)

buy it, and so we took the inventory at the first of the year.

Q. That is the first of the year 1955? [48]

A. Yes; January 1, 1955, which we took our inventory at the first of the year, and so we asked them if they would like us to take an inventory, which we would arrive at a figure on the inventory being the sales and purchases, what we had sold off of that and by the purchases up to the date, and so they said that was fine with them, and that is how we arrived at that figure.

Q. Did you prepare at that time a general inventory of the merchandise on hand?

A. You mean a listed inventory?

Q. Yes. A. No.

Q. I don't mean detailed; I mean a general inventory. A. Yes, general inventory.

Q. That is as of April 1, 1955? A. Yes.

Q. May I have this marked, please?

(Document, inventory of 1955, marked Defendants' Exhibit 10 for Identification.)

Q. (By Mr. Tonkon): Is that the general inventory you are referring to? A. Yes.

Q. That was prepared by you? That is your own writing? A. That's right.

Q. That was prepared on about April 1, [49] 1955? A. That's right.

Q. That shows generally what you have in the way of merchandise in the general classifications?

A. That's right.

(Testimony of Marion E. Dickie.)

Mr. Tonkon: We would like to offer that in evidence, your Honor.

Mr. Miller: For what purposes was that prepared, Mrs. Dickie?

The Witness: For the sale to the Branches.

Mr. Miller: That was specially——

The Witness: To arrive at an inventory price to the Branches.

Mr. Miller: That was especially prepared to show them?

The Witness: Yes; this was prepared for the Branches.

Mr. Miller: I believe the document is entirely self-serving, your Honor. It is not a record kept in the ordinary course of business.

The Court: That would not make any difference.

Do you have a 1954 inventory, the one that was taken on December 31, 1954?

The Witness: I don't have it here. We have it.

Q. (By Mr. Tonkon): Was this Exhibit 10 for Identification, was that computed from the inventory made as of the end of 1954? A. Yes.

Q. You prepared it personally?

A. Well—— [50]

The Court: I am going to admit it.

(Document previously marked Defendant's Exhibit 10 for Identification was thereupon received in evidence.)

Q. (By Mr. Tonkon): In 1957 approximately

(Testimony of Marion E. Dickie.)

during the month of June, the Branches had not made payments in accordance with the terms of their contract with you and Mr. Dickie?

A. No; they hadn't.

Q. They were in default? A. Yes.

Q. You had employed lawyers to take whatever action was necessary? A. Yes.

Q. I believe they filed a suit in your behalf?

A. Yes.

Q. Then after the Court made a decree that is in evidence here, did you go to the place of business and take another new inventory?

A. Yes, with the help of Mr. and Mrs. Knight and their daughter.

Q. Who are Mr. and Mrs. Knight?

A. They are the people that we originally bought the store from.

Q. That is back in 1948? A. 1948.

Q. They lived there in Riddle?

A. Yes. [51]

Q. They are an old couple? A. Yes.

The Court: What difference does it make if they are old or young?

(Document presented to the witness.)

The Court: Are those inventory sheets that you used or made up at the time that you took the inventory in July, 1957?

The Witness: Yes.

The Court: You helped prepare it?

The Witness: Yes.

(Testimony of Marion E. Dickie.)

Q. (By Mr. Tonkon): Is that your writing on all the paper?

A. Not on all of those papers. There is a lot of Mr. Knight's writing.

The Court: Show it to me.

Q. (By Mr. Tonkon): But it was all done under your direction?

The Court: Who priced it out? Who priced the inventory out?

(Inventory sheets above referred to marked Defendants' Exhibit No. 11 for Identification.)

The Witness: The prices were on the merchandise, the retail prices, and we took a third off of it.

The Court: Because that was the average mark-up, was a third?

The Witness: Yes. [52]

Mr. Tonkon: That is the same way you took the inventory as appears from Exhibit 10; is that right?

A. Yes.

Q. In April, 1955? A. Yes.

Mr. Tonkon: We offer Exhibit 11 in evidence, your Honor.

Mr. Miller: If the Court please, I really have no objection to its introduction except I am wondering what its purpose is. We have as an agreed fact in here that the amount is \$14,786.17, which this inventory shows.

Mr. Tonkon: We are laying a foundation.

The Court: I think it is certainly pertinent. It is the most pertinent document that has been intro-

(Testimony of Marion E. Dickie.)

duced so far on the question of inventory because maybe the witness can testify as to what items were there at this time as compared to what items were there originally.

Mr. Miller: I have no objection, your Honor.

The Court: Objection overruled. The exhibit is admitted.

(Document previously marked Defendants' Exhibit 11 for Identification was received in evidence.)

Mr. Tonkon: He didn't make an objection, your Honor.

The Court: Even if he did, I would overrule it.

Mr. Tonkon: We do not want error in the record.

Mr. Miller: Well, then, I object. [53]

Q. (By Mr. Tonkon): Did you at my instance prepare a summary, comparing the different classifications of items appearing upon Exhibit 10 and Exhibit 11 to show the amounts of the different classifications that appear in the inventory of April 1, 1955, and those that appear in July 1, 1957?

A. Yes, I did.

Mr. Tonkon: May we have that marked, please?

(Summary above referred to marked Defendants' Exhibit 12 for identification.)

The Court: Are those different items or just in duplication of the same?

Mr. Tonkon: They are all the same. That sum-

(Testimony of Marion E. Dickie.)

mary is Exhibit 12 for identification that you have in front of you now.

A. Pardon me, I didn't hear you.

Q. Is that summary the Exhibit 12 that you have in front of you now? A. Yes.

Mr. Tonkon: We offer it in evidence, your Honor.

Mr. Miller: I still can't see the relevancy.

The Court: I am going to overrule the objection and permit the exhibit in conditionally, anyway. It is a document from which the witness could testify. Is that what you want her to do?

Mr. Tonkon: That's right.

(Document previously marked Defendants' Exhibit [54] 12 for Identification was thereupon received in evidence.)

Q. (By Mr. Tonkon): Now, looking at Exhibit 12, Mrs. Dickie, will you compare the difference in the inventory taken on April 1, 1955, of school supplies and paper products with those appearing in the inventory that was taken by you on July 1, 1957?

The Court: What do you mean, compare?

Mr. Tonkon: Well, let her read these figures.

The Court: I can read. I am not very smart, but I can read.

Mr. Tonkon: Well, there seems to be some question as to whether this document in and of itself can be part of the record.

(Testimony of Marion E. Dickie.)

The Court: The basic underlying documents, these were taken from inventory sheets?

Mr. Tonkon: Right.

The Court: This is just a compilation from that?

Mr. Tonkon: Yes.

The Court: I am going to admit it on the basis that it was taken from the inventory sheets and is based upon Exhibits 10 and 11.

Mr. Tonkon: Right.

The Court: This is just a summary, and I think, under the law, these summaries are admitted, and I am going to admit them. [55]

(Document, Summary previously marked Defendants' Exhibit 12 for Identification, was thereupon received in evidence.)

Mr. Miller: Up until now I can't see any relevance to the document. It doesn't tend to prove anything yet.

The Court: That is what we have to find out right now. I said I don't know what you mean by "compare." Mrs. Dickie, would you tell me this: On the first item, school supplies and paper products, are you in a position to tell us what portion of the inventory, which was \$250.46, which existed on July 1, 1957, was there on April 1, 1955, what items?

The Witness: I think that would be very difficult.

The Court: Doesn't the mark—did you put a

(Testimony of Marion E. Dickie.)

date on the box of each school supply when it arrived?

The Witness: No, the only thing I can remember is that I did a lot of mark-up work myself in the store along with Mr. Branch, and I know when we took the store back that my markings were all over the merchandise, I mean price marks, and we used a grease pencil so I couldn't even venture a guess as to what was there.

The Court: In other words, on only some of the inventory or boxes you recognize your own pricing mark?

The Witness: Yes.

The Court: So you knew that it was merchandise that was purchased prior to April 1, 1955? [56]

The Witness: That's right.

The Court: Do you know which of those paper supplies were actually in the store on April 1, 1955?

The Witness: I couldn't say exact at all.

The Court: Could you say as to an estimate?

The Witness: I don't think I could even estimate.

The Court: Do school supplies sell quickly or slowly?

The Witness: At the time we had to sell the store they had slowed up for this reason, that they had opened a drugstore right down by the school. We used to do a terrific school business, and then our school business—we were nearly up straight from the school on the——

The Court: How many times did you ordinarily

(Testimony of Marion E. Dickie.)

turn the school supplies and paper products; three times a year, four times a year, six times a year?

The Witness: Oh, no, I think we bought them about, little by little, but we usually bought our main——

The Court: In July?

The Witness: At one time during the year, yes, around in July.

The Court: That is when most of the school supplies are purchased?

The Witness: Yes, but you filled in once in a while.

The Court: Was the same thing true of greeting cards?

The Witness: Yes, well, greeting cards, they moved the [57] greeting card counter clear to the back of the store. We did a tremendous business in greeting cards because we set it right up in front because when they set it back there I don't believe they were doing any volume of greeting cards at all.

Mr. Miller: If the Court please, I object to that, a conclusion based upon no facts, a pure conclusion, no foundation for that.

The Court: Objection overruled. Did you take this inventory yourself on the greeting cards?

The Witness: Yes.

The Court: Did you have a lot of your own boxes?

The Witness: Yes.

(Testimony of Marion E. Dickie.)

The Court: Was there a considerable amount of boxes that you recognized your grease pencil on?

The Witness: Well, now, wait a minute, I think you have it wrong. It is a case where they are filed underneath. The greeting cards are displayed up above, and the drawers are full of them; however, you know, you get used to looking at the greeting cards and not whether they could have replaced the same ones.

The Court: They could have replaced the same ones so you are not in a position to say definitely whether all or any of these cards that were there on July 1, 1957, were there on April 1, 1955?

The Witness: No, I know there were a lot of them that were there. [58]

The Court: How, by the color?

The Witness: Yes, they change.

The Court: Your greeting cards change. What about your dry goods? Do you recognize a lot of old friends there, too?

The Witness: Yes.

The Court: There was a lot of that obsolete merchandise?

The Witness: Yes.

The Court: What type of item didn't move?

The Witness: Oh, you know, you get offbeat shirts or something like that once in a while, but we used to put them on sale and turn it over, but my handwriting or marking was on a lot of dry goods, too. I can't say it was on all of them.

The Court: What was that?

(Testimony of Marion E. Dickie.)

The Witness: It was not on all of it; however, it was Mrs. Branch's, but I don't know whether she marked it up when she was with us or when they purchased.

The Court: Were the individual shirts, for example, were they marked, or was just the box marked?

The Witness: No, individually marked every shirt.

The Court: Now the shoe department, were there a lot of shoes there that were originally sold to them in April, 1955?

The Witness: That is where we noticed my handwriting was very predominating, in the shoe department.

The Court: In other words, in the shoes was a substantial portion of the items that were sold that were still in stock as [59] of July 1, 1957?

The Witness: Yes.

The Court: Could you estimate the dollar volume?

The Witness: Dollar value, you mean?

The Court: Yes.

The Witness: Well, I don't believe I could. They went in more for frivolous shoes, which they sold out. Ours were more staple products, I mean, staple shoes like the average wearing shoes.

The Court: They didn't sell so well?

The Witness: No, the frivolous shoes——

The Court: Didn't sell well?

The Witness: There were six pair, I remember

(Testimony of Marion E. Dickie.)

six pair of high-heel shoes which we didn't carry in stock.

The Court: Those staple shoes ordinarily sell better than frivolous shoes, don't they?

The Witness: Yes.

The Court: I understand you had quite a few staple, or did you have quite a few of the frivolous?

The Witness: No, I had staple shoes.

The Court: But two years later they were still in stock?

The Witness: May I explain this? Well, we bought more expensive shoes than they did because we would not stock the cheap shoe because it would not hold up on the gravel schoolyard with youngsters. So they bought a cheaper shoe which [60] moved out faster so it left our more expensive shoes there on the shelves, and they are still sitting there.

The Court: The expensive ones?

The Witness: The more expensive ones.

The Court: How about sporting goods and housewares? Was there a lot of merchandise that you inventoried July 1st? That constitutes the balance that was on April 1, 1955?

The Witness: I couldn't see any change in that from the time we left because we bought out the sporting goods division from another store and put it in, and I couldn't see any change except lessening of merchandise.

The Court: But the housewares was about five times as much as the sporting goods originally?

(Testimony of Marion E. Dickie.)

The Witness: Yes.

The Court: Did you recognize some of your old pencil or crayon marks?

The Witness: Yes, some merchandise in that.

The Court: What about the hardware?

The Witness: The hardware, yes; however, that is also hard to distinguish because some of it was in bins, some of the pipe fittings were in bins, and so that would be hard to determine; however, it was a long ways down from what we kept it.

The Court: What about paint?

The Witness: The paint, the only thing we noticed was this Kem-Tone paint, and I know the exact price on it because [61] we asked the wholesale man that was going to take it back, and that is \$265. We were selling it for that because we can't get rid of it. It was all the stock.

The Court: The Pittsburgh paint was better paint?

The Witness: Yes.

The Court: Sold more?

The Witness: That's right.

The Court: Did it sell pretty fast?

The Witness: Well, we did, but they didn't seem to like it. That is why we put the Kem-Tone in.

The Court: Are there certain colors that sell more rapidly than others?

The Witness: I think so.

The Court: Could you recognize your pencil marks on these paints, too?

(Testimony of Marion E. Dickie.)

The Witness: You can recognize the can color. Pittsburgh had just changed their labels.

The Court: When?

The Witness: Just a short time before we sold the store. We had stocked a lot of new paint, too, and these old labels cans were still there.

The Court: So you had a lot of old cans?

The Witness: Yes, with the old label on them.

The Court: Could you tell us about how much?

The Witness: I am not sure. [62]

The Court: Did you have as much as a thousand dollars, would you say?

The Witness: We had more than that.

The Court: On July 1, 1957?

The Witness: Oh, we had a lot more than that, I am sure.

The Court: \$1500, \$2000?

The Witness: Gee, I don't know. I would hate to guess. I would hate to venture a guess.

The Court: All right; go ahead.

Q. (By Mr. Tonkon): Well, now, Mrs. Dickie, could you make an estimate as to how much of the merchandise that was inventoried by you on July 1st, 1957, in this store at Riddle, Oregon, was the same as the merchandise that was sold to the Branches on April 1, 1955?

Mr. Miller: If the Court please, I am going to object to that. In answer to the Court's question, she kept saying, "I don't know." Now, I don't know how she can suddenly——

(Testimony of Marion E. Dickie.)

The Witness: That would be awfully difficult because I don't think I could give you——

Q. (By Mr. Tonkon): Have you any idea at all?

The Court: Of course, that would not do me very much good.

The Witness: The only thing I know was there was \$265 worth of paint and six pairs of high-heeled shoes that were different in the store and we didn't——

Q. Then you are saying that substantially all of the [63] merchandise that you took inventory of on July 1st was there on April 1, 1955; is that right? A. No.

Mr. Miller: If the Court please, I object to that. That is Counsel's conclusion.

The Witness: I am saying—I am sorry.

The Court: Let her go ahead. This witness has been answering very honestly, I think. Go ahead and tell us what you were going to say. You don't have to worry about what Mr. Tonkon is asking. You just answer the way you want to answer. You were saying that that is what you said, that substantially all the stock that was there on July 1, 1957, was there on April 1st. You said you knew definitely about the Kem-Tone paint and the six pairs of high-heeled shoes. Then you were about to say something else. Go ahead and say it.

The Witness: Well, if there was any change in the other, it would be the same as I believe what

(Testimony of Marion E. Dickie.)

we left there, and I couldn't distinguish whether we bought it or they bought it, see.

Q. (By Mr. Tonkon): But you did see a lot of old price marks on the merchandise?

A. Yes, I did.

Q. On the appliances after you acquired the stock in July, 1956, were you required to make payment to some financing agency for them? [64]

A. Let's see, now. I didn't understand that.

Q. On the appliances, did you have to pay somebody for them afterwards? A. In 1957?

Q. Yes.

A. Yes, we put the appliances that were there on consignment from appliance wholesalers. They were taking them back, and they offered them to us.

Q. In other words, they had come to repossess them, and you told them to leave them, but you would not buy them? A. Yes.

The Court: I don't think that is involved in this case at all. We all know that they took the appliances back. The figure that I would be most interested in is what is the dollar volume during this period of appliances that were purchased from appliance wholesalers and other possible dealers at that time. Do you have that broken down?

Mr. Tonkon: Of the appliances?

The Court: Yes.

Mr. Tonkon: You mean during the time the Branches were in possession?

The Court: Yes. The reason for it is this: There

(Testimony of Marion E. Dickie.)

was a hundred and some-thousand dollars business done in about two years which cost \$104,000. It is practically unbelievable that very much of the stock that was in there April 1, 1955, should [65] be there on July 1, 1957, unless a great deal of the dollar volume is accounted for by the very transactions about which Mrs. Dickie has testified; namely, that they have gone into the business of appliances that were floored plus the cheaper items that they have sold, which might have moved a little faster, but a built-up inventory of \$136,000, I mean to sales, would be quite a bit on items of clothing. It is usually bigger items that account for this dollar volume.

Mr. Tonkon: Your Honor is asking for something that is within the province of the plaintiff in this case. They have the books and records. They have the bankrupt here; nothing under the control of the defendants. The burden is on the plaintiff to show that, too.

The Court: I am not saying that it is your province or duty or anybody's duty. I am just calling attention to this condition.

Q. (By Mr. Tonkon): When you were in the operation of this business up until 1955, what was your experience as to whether the newer merchandise you bought moved out of the business by way of sales more readily than the older merchandise?

A. Well, definitely, the newer merchandise, turned over. As your styles turn over, it turns over faster. You keep the staple stuff that you

(Testimony of Marion E. Dickie.)

have to have. Maybe you sell one in five years, but you still have to have it in case of plumbing, wiring, electrical wiring or things. [66]

The Court: What percentage of your stock would be the items that do not move more than, say, once a year or once every two years?

The Witness: That would be hard to venture a guess on because we had electrical, complete electrical fixtures for wiring a house or plumbing or plumbing a house and painting a house, and so it would be hard to guess.

The Court: Do you operate the store now?

The Witness: Do we? We have Mr. and Mrs. Knight taking care of it for us, your Honor, the people we purchased it from.

Mr. Tonkon: You may cross-examine.

Cross-Examination

By Mr. Miller:

Q. Mrs. Dickie, how long did you say you operated this store before you sold it to the Branches?

A. Over seven years.

Q. Seven years? A. Yes.

Q. What was the usual amount of inventory you had on hand during those seven years?

A. Between that period?

Q. What was the average, say, what was the average the year before you sold it?

A. It was right around \$30,000. It would go up higher, you [67] know, and then it would lower

(Testimony of Marion E. Dickie.)

itself. They are seasonal. It is seasonal, a lot of that, just before Christmas.

Q. Will you say it was \$30,000 that was your approximate average inventory?

A. I think that would be a good guess.

Q. So that at the time that you sold you had on hand an approximate average inventory; is that right?

A. That's right.

The Court: Could you tell us how much business you did in the year 1954? What was your gross business?

The Witness: Well, it was just under a hundred thousand. It was ninety-some thousand.

The Court: \$97,000?

The Witness: Ninety-some thousand. I am sorry, just guessing on those figures.

The Court: In 1955 until you sold it, do you know how much business you did?

The Witness: Wait a minute. Maybe I heard you wrong the first time.

The Court: 1954, that was the full year before you sold?

The Witness: Yes.

The Court: How much did you do in the first four months of 1955; January, February, March—three months?

The Witness: That I don't have figures on.

The Court: Was that about the same average? [68]

The Witness: Yes, of course, it starts picking up from about March on.

(Testimony of Marion E. Dickie.)

The Court: You were doing that without the sale of heavy appliances?

The Witness: Mrs. Branch made the statement there weren't any appliances in there, but we had a lot of refrigerators, ranges and appliances in there at the time they took the store over.

The Court: Oh, you did?

The Witness: Yes, we did. We had a big floor, and we had to pay for those cash on delivery, so we didn't have a flooring plan. It was just coming in as we sold the store so ours were not on consignment.

The Court: Had you done a pretty good business in appliances?

The Witness: Yes, we did.

The Court: Do you know how often you used to turn your stock on paints?

The Witness: No, I don't believe that was ever really broken down.

The Court: Are there any further questions?

Q. (By Mr. Miller): How often did you turn your stock generally, or how many times a year, let us say, did you turn your stock?

A. Well, we did ninety-some thousand last year. On, we will say, approximately \$30,000 we must have turned it three times, [69] but that is not turning the complete stock now because some of it, it will turn over ten times or twenty times against the slow-moving.

Q. Would you normally keep stock for a year or two years?

(Testimony of Marion E. Dickie.)

A. Yes, we still have some in plumbing down there that we purchased the first year we were in there. Those big malleable fittings, for instance, were very necessary.

The Court: She is wrong when she says she turned it over three times. Even on her figures, she only turned it over twice. \$90,000 on a \$30,000 inventory is twice because she was discounting it a third, you see.

Q. (By Mr. Miller:) Were you in the store at the time you sold it to the Branches until you went in there on July 1, 1957?

A. Was I in the store?

Q. Had you ever been in the store?

A. Oh, yes.

Q. How many times?

A. I have no idea on that; not too often after we moved away from town there. I went back periodically.

Q. Mrs. Dickie, without trying to confuse the testimony, my recollection of it when we examined you under 21(a), you stated you had not been down there until sometime in 1957.

A. No, I didn't make that statement. You check closely.

The Court: What difference would that make, Mr. Miller?

Mr. Miller: Well, your Honor, she has testified to a lot [70] of things that took place during this time.

(Testimony of Marion E. Dickie.)

The Court: I didn't hear it. I just heard what she testified to at the time that she sold the store and what she testified to at the time she took the inventory thereafter. I heard no part of the testimony between those dates.

Mr. Miller: She said she used to put on sales then. I wondered how she knows.

The Court: That would not be admissible here anyway. She didn't so testify here today.

Mr. Miller: All right, your Honor. I will go on with it from there.

Q. Mrs. Dickie, you do not actually have any idea dollar-wise what these items that remained would total up to now, do you?

A. No, I really do not.

Q. No. You are also not here trying to tell this Court that what you did sell to the Branches is completely dead stock, are you?

A. No, I am not trying to tell the Court that we sold a dead stock to them. Is that the question you asked me?

Q. Yes.

A. No, we did not sell a dead stock to them. We sold a stock that involved live merchandise plus slow-moving merchandise.

The Court: Was that a clean stock that you sold?

The Witness: Yes.

The Court: Had you gotten rid of most of the obsolete goods [71] by sales?

The Witness: Maybe this will answer your ques-

(Testimony of Marion E. Dickie.)

tion. When they took over the store, I stayed with them for two and a half weeks, and Mrs. Branch and myself were very friendly at the time, and I was trying to help them put on an opening sale. We had gone over the store to find some dead stock to put on the sale, and we had a horrible time doing it, but my intention was it was all clean stock.

Q. (By Mr. Miller): You testified, Mrs. Dickie, that the Branches bought cheaper shoes. Now, as a matter of fact, you don't know what they bought simply month to month, do you?

A. Yes, sir. The only thing I can say is I was in the store off and on, stopped in the store off and on, and, naturally, you see the stock in the store.

The Court: Is there any further cross-examination?

Mr. Miller: I have no further questions, your Honor.

The Court: Any further questions?

Mr. Tonkon: No.

The Court: That is all.

(Witness excused.) [72]

The Court: Do you have any more testimony?

Mr. Tonkon: No, the only other testimony may be cumulative.

The Court: That is the testimony.

Let me look at that sales book or the ledger for a minute. You can't tell anything from these books.

Mr. Tonkon: I tried to find something out, and I couldn't.

The Court: I am going to make some findings of fact here without regard to the ultimate outcome. I am going to find on the basis primarily of plaintiff's own testimony that on July 1, 1957, one-half of the stock of merchandise was stock that the bankrupts acquired from the defendants on April 1, 1955. Now, that does not mean that the plaintiffs are entitled to a judgment for that amount because I don't know. I am concerned about this judgment in the State Court, and I am going to think about that and read the cases that you are suggesting.

Mr. Miller: If the Court please, I have never, in deference to Counsel, taken the matter very seriously. I wonder if I might submit additional memorandum. I just put in a couple cases because, as I say, on principle it did not seem to me it was applicable, and I don't think so, on the question *res judicata*. So I would like permission to submit additional memorandum on that one point.

The Court: I saw your cases. I read the first part of your brief. I read all of Mr. Tonkon's brief.

Mr. Miller: May I make a correction in my briefs before [73] I forget? My girl made a very serious error. On page 1 in Line 20 the words "chattel mortgage" should be exactly opposite. They should be "conditional sales contract"—"it is not the office of the conditional sale contract to provide security upon property never owned or sold by seller."

The Court: I will hear your argument.

(Argument by Counsel for the respective parties to the Court.)

The Court: In view of my holding that one-half of this merchandise was in the possession of the bankrupt July 1, 1957, acquired from the defendants, are you contending that the defendants are not entitled to that, also?

Mr. Miller: Oh, yes; I certainly am. That is one of the reasons why I gave your Honor the brief on burden of proof for the whole doctrine of confusion of goods is involved, the doctrine of confusion of goods, and the cases I have cited there simply state that if a man allows his merchandise to get mixed up with merchandise that does not belong to him under such state that it cannot be segregated, then he will lose. There are several cases on that.

The Court: But the point is that your own witness indicated that there was one-half.

Mr. Tonkon: At least one-half, she said.

The Court: One-half of the merchandise that was sold to her was still in her possession, but this is not an action for [74] the return of specific goods. It is an action for the return of the money.

Mr. Miller: The burden is on them to identify the merchandise. I have asked everybody questions, and they cannot identify it.

The Court: What difference would it make if they could have identified each particular piece, because your lady testified as to the half? Now,

suppose that she came to that conclusion by identifying each item? Well, I don't want to question you any more. I just call that to your attention.

Mr. Miller: I will hand your Honor this memo and give one to Counsel for whatever it is worth. The things I would like your Honor to ask Counsel——

The Court: You ask him.

Mr. Miller: All right, I will ask Counsel. Counsel keeps talking about how they acquire title to this merchandise, and I would like to know where they do.

The Court: It seems to me that the defendants did not get the amount they were claiming, \$14,250, because I cannot believe that stock would be that much off. Anybody who looks at the way they did business, the amount of purchases made to the sales, would know that these people had to go broke, and if they are operating on that one-third basis now, the plaintiff's are going to be in a very serious position, if they are not already, because you can't operate on that basis now, so I don't think [75] the merchandise was worth that full amount.

I think there is good reason to believe that these contracts have to be strictly construed, but as to the amount of merchandise which the evidence showed was originally sold, I think probably the equities are in favor of the defendants. Of course, none of this take into consideration the rights which the defendants may have acquired by reason of the State Court action, the *res judicata*. nor

does it take into consideration Mr. Miller's contention that the transaction was, in effect, an unrecorded chattel mortgage and that they have rights.

I think that there should be some place where the parties should have a meeting of the minds but if they cannot, of course, I am here to decide the case. I am not trying to shirk my responsibilities.

Mr. Miller: I would like to have some time to brief the point on *res judicata*.

The Court: Everybody can have all the time they want. You may have two weeks.

Mr. Tonkon: We may have opportunity to reply.

The Court: Yes, surely. You take two weeks. Mr. Levenson or Mr. Tonkon can have two weeks.

In the meantime, we are going to take a look at it. We are not going to take a look at the case on the law until the briefs are in so that if it is possible to get together, let us know. However, if you can see right now that you cannot do it, [76] then we will start working on the case.

Mr. Miller: I would like to have permission to return the 1957 income tax. Have you any objection?

Mr. Tonkon: No.

(Trial Concluded.)

[Endorsed]: Filed May 21, 1959. [77]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss:

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Pretrial Order; Opinion of Judge Solomon; Findings of fact and conclusions of law; Judgment; Plaintiff's motion to amend findings, etc.; Notice of appeal; Bond for costs on appeal; Order extending time to docket appeal; Statement of points upon which appellant intends to rely on appeal; Stipulated designation of contents of record on appeal; Order authorizing clerk to transmit original exhibits; and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 9425, in which Frank A. Dudley as Trustee of the Estate of Merle K. Branch and Wanda B. Branch, co-partners dba Riddle General Store, is the plaintiff and appellant and Clifford E. Dickie and Marion E. Dickie, husband and wife, are the defendants and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and appellees, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of testimony filed in this

